(20,481.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 166.

B. F. ASBELL, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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1 In the Supreme Court of the State of Kansas.

Be it remembered, that on the 21st day of March, 1906, there was filed in the office of the clerk of the Supreme Court of the State of Kansas an Assignment of Errors, Notices of appeal and Transcript of the record from the district court of Labette county, which assignment of error, notices of appeal and transcript of the record are in words and figures as follows, to-wit:

2 No. 14874.

In the Supreme Court of the State of Kansas.

Filed Mar. 21, 1906. D. A. Valentine, Clerk Supreme Court.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Bill of Exceptions and Transcript.

3 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Filed Mar. 21, 1906. D. A. Valentine, Clerk Supreme Court.

Assignment of Errors.

Comes now the defendant, B. F. Asbell, and respectfully shows to the court that the District Court of Labette County, Kansas, before whom the above entitled cause was tried, and all proceedings therein had, erred in the rendition of judgment against him, and in the proceedings had in the said cause, as will fully and manifestly appear in the Bill of *Bill of* Exceptions and transcript of the record in said cause attached hereto and made part hereof, in the following particulars to wit:—

First. That said district court erred in overruling the motion filed by the defendant to quash the information filed in the said court against him.

Second. That said district court erred in admitting testimony offered by the plaintiff, State of Kansas, over the objection of the defendant because the said information did not charge a public offense under the laws of the State of Kansas.

Third. The said district court erred in admitting testimony on the part of the plaintiff, State of Kansas, over defendant's objections and exceptions.

4 Fourth. The District court erred in suggesting before the jury that the witness, Scott, "is trying to answer the question fairly," and in lecturing the attorney for the defendant before and in the presence of the jury during the trial of said cause.

Fifth. The said district court erred in admitting, over the objection and exception of the defendant, the rules and regulations of the department of the Interior, and to rule thirteen thereof, offered by the plaintiff, State of Kansas.

Sixth. The said district court erred in overruling the demurrer filed by the defendant, at the close of the testimony of the plaintiff, State of Kansas.

Seventh. The said district court erred in permitting the attorney for the State of Kansas, plaintiff in his closing argument to the jury, over the objection of the defendant to repeatedly state to the jury, in such argument, that if the defendant had had a certificate of inspection he would have had it in court, and would have produced it to the court and jury, and erred in denying the motion of the defendant, made at the time, to strike such statements and argument from the jury.

Eighth. The said district court erred in permitting the attorney for the State of Kansas to comment upon the failure of the defendant to introduce evidence in his own behalf, when making his closing argument to the jury, and to call attention of the jury to the fact that defendant had failed to produce a certificate to the court and jury, and to assert to such jury that if the defendant had had such a certificate he would have produced it before the court and jury, and the said court erred in refusing to admonish the jury to disregard such argument, all over the objection and exception of the defendant, made at the time.

Ninth. The said district court erred in overruling the motion filed by the defendant for a new trial.

5 Tenth. The said district court erred in overruling the motion in arrest of judgment filed by the defendant.

Eleventh. The said district court erred in its instructions to the jury.

Twelfth. The said district court erred in refusing to give to the jury the instructions asked by the defendant.

Thirteenth. Said district court erred in rendering judgment against the defendant.

All of which said rulings and decisions of the court were duly and legally excepted to at the time the same were made by the court.

Wherefore, by reason of the premises, the defendant prays the judgment and order of this court reversing the judgment and decree of the district court of Labette County, Kansas, in this cause, and for an order discharging said defendant.

A. D. NEALE,
Attorney for Appellant.

6 In the District Court of Labette County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Bill of Exceptions and Transcript.

Be it remembered, that on the 24th day of October, 1905, there was filed in the office of the clerk of the district court of Labette County, Kansas, an information against the defendant, B. F. Asbell, charging him with a violation of what was termed the quarantine laws of the State of Kansas, which said information, with all of the endorsements thereon is in the words and figures following, to-wit:

Filed Mar. 21, 1906.

D. A. VALENTINE,
Clerk Supreme Court.

7 STATE OF KANSAS, *Labette County, ss:*

In the District Court in and for said County.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Information.

I, E. L. Burton, the undersigned County Attorney of said County in the name and by the authority and on behalf of the State of Kansas, come now here and give the Court to understand and be informed that on the 15th day of October, A. D. 1905, in the said County of Labette and State of Kansas, one B. F. Asbell, did then and there unlawfully, willfully and intentionally bring, drive and transport 59 head of cattle, a further description of which affiant is unable to give, in said Labette County and State of Kansas, from a point south of the south line of Kansas, to-wit: from a point in the Indian Territory and said cattle were not brought into the State of Kansas for immediate slaughter, and the said B. F. Asbell did bring said cattle into Labette County and State of Kansas without having caused said animals to be inspected and passed under certificate of health by the Live Stock Sanitary Commission of the State of Kansas or any inspector thereof, contrary to the Statutes *and* such cases made and provided and against the peace and dignity of the State of Kansas.

E. L. BURTON,
County Attorney.

STATE OF KANSAS, *Labette County, ss:*

I, E. L. Burton, being duly sworn on oath say; that I am the County Attorney of said Labette County, Kansas, and that the allegations set forth in the within information are true to the best of my knowledge and belief.

E. L. BURTON.

8 Subscribed in my presence and sworn to before me by E. L. Burton this 24th day of October, A. D. 1905.

[SEAL.] GEO. T. STICE,
Dep. Clerk of the District Court.

STATE OF KANSAS, *Labette County, ss:*

I, J. McFall, being first duly sworn on oath say: that I have read the above and foregoing information and that the facts therein alleged are true. So held me God.

J. McFALL.

Subscribed in my presence and sworn to before me by J. McFall this 24th day of October, A. D. 1905.

[SEAL.] GEO. T. STICE,
Deputy Clerk of the District Court.

Endorsed: No. 1776. The State of Kansas, Plaintiff, *vs.* B. F. Asbell, Defendant. Information. Filed Oct. 24, 1905. Edwin Potts Clerk Dist. Court by Geo. T. Stice, Deputy. List of Witnesses: E. E. Scott; Harry Whitney; Chas. White; E. M. Ruks; H. Gertson; Mrs. Tomay; R. M. Buffington; J. McFall; John Mullenhour; —— Kimmons; Mrs. H. Gertson.

9 And be it further remembered, That thereafter, and on the 24th day of October, 1905, a Warrant was duly issued on said information for the arrest of the said defendant, which said warrant is in the words and figures as follows, to-wit:—

10 *Warrant—Upon Original Information.*

STATE OF KANSAS, *Labette County, ss:*

In the District Court Within and for the County and State Aforesaid.

The State of Kansas to the Sheriff of Labette County, Greeting:

Whereas, Information has been duly made and filed in the District Court in the County of Labette, in the State of Kansas, charging that one B. F. Asbell on the 15th day of October A. D. 1905 at and withing the County and State aforesaid did then and there unlawfully, willfully and intentionally bring, drive and transport 59 head of cattle a further description of which affiant is unable

to give in said Labette county and State of Kansas from a point south of the south line of Kansas, to-wit: from a point in the Indian Territory and said cattle were not brought into the State of Kansas for immediate slaughter and the said B. F. Asbell did bring said cattle into Labette County and State of Kansas without having caused said animals to be inspected and passed under certificate of health by the Live Stock Sanitary Commission of the State of Kansas or any inspector thereof, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Kansas.

Therefore, this is to command you forwith to take the person accused, namely B. F. Asbell and bring him before the Judge or Clerk of said District Court to be admitted to bail for his appearance at the next term of said District Court, to be held in this said County of Labette.

Given under my hand and seal of said Court this 24th day of October A. D. 1905.

[SEAL.]

EDWIN POTTS,
Clerk District Court, Labette County,
By GEO. T. STICE, *Deputy.*

11 *Order Fixing Bail—By Clerk.*

The amount of bail in this proceeding not having been fixed by the Court, and the Judge of said District Court not being in said Labette County, I hereby fix the amount of bail to be required under this warrant at Two Thousand ($2000.00) Dollars.

Witness my hand and the seal of said District Court at my office in said County this 24 day of October, A. D. 1905.

EDWIN POTTS,
Clerk of the District Court of Labette County, Kansas,
[SEAL.] By GEO. T. STICE, *Deputy.*

Endorsed as follows:

STATE OF KANSAS, *Labette County, ss:*

Received the within writ on the 25th day of October 1905 and on the 30th day of October 1905 executed the same by arresting the within named B. F. Asbell who gave bond in the sum of Two Thousand Dollars.

Fees.

Serving and returning warrant	.75
Mileage 18 miles	1.80
Approving bond	.50
Total	3.05

FRANK DIEMST, *Sheriff.*

District Court Labette County, Kansas. No. 1776. The State of Kansas Plaintiff *vs.* B. F. Asbell Defendant. Warrant (Upon original information in District Court). Issued Oct. 24 1905 Returned and filed Oct. 31 1905. Edwin Potts Clerk District Court Geo. T. Stice Deputy.

12 That by virtue of the said warrant the said defendant was arrested by the sheriff of said county, and held to answer the charge so preferred against him; that upon his said arrest he was required to and did enter into a recognizance in the sum of $2000.00 for his appearance at the next term of said court.

That thereafter, and on the 8th day of December, 1905, it being on one of the judicial days of said December term of court, said defendant filed in said court his motion to quash the information so filed against him, which motion, with all the endorsements thereon is in the words and figures as follows, towit:—

13 In the District Court of Labette County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Motion to Quash Information.

Comes now the defendant and moves the Court here to quash the information filed herein and to discharge the defendant for the reason that the said information does not charge the defendant B. F. Asbell with a public offense.

A. D. NEALE,
Attorney for Defendant.

Endorsed: No. 1776. The State of Kansas *vs.* B. F. Asbell. Motion to Quash Information. Filed Dec. 8, 1905. Edwin Potts, Clerk Dist. Court.

And be it further remembered that thereupon the following proceedings were had in said cause. to-wit:—

14 In the District Court of Labette County, Kansas.

December 4th, December Term, A. D. 1905. First Judicial Day.

Court convened pursuant to Statutory Enactment.

Present: Hon. Thos. J. Flannelly, Judge, Edwin Potts, Clerk, Frank Dienst, Sheriff, E. L. Burton, County Attorney, C. E. Vance, Reporter.

December 8th, December Term, A. D. 1905. Fifth Judicial Day.

Court convened pursuant to its adjournment.

Present: Hon. Thos. J. Flannelly, Judge, Edwin Potts, Clerk, Frank Dienst, Sheriff, E. L. Burton, County Attorney, C. E. Vance, Reporter.

Thereupon the following proceedings were had and directed to be entered of record.

No. 1776.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Now on this 8th day of December, A. D. 1905, the same being a regular judicial day of the December, 1905, term of said court, this cause came regularly on for hearing upon the motion of the defendant to quash the information filed herein. The defendant appeared in person and by A. D. Neale, his attorney in support of said motion, and the plaintiff appeared by E. L. Burton, County Attorney and W. A. Disch, Assistant, in opposition thereto. And the Court having heard said motion and the argument of respective counsel, and being now fully advised in the premises, doth overrule any deny said motion.

15 To which adverse decision and ruling of the Court in overruling and denying said motion, the defendant at the time duly excepted and excepts. Thereupon the State asks and is given leave to amend its information filed herein. Thereupon the defendant files a second motion to quash the information as amended. And the Court having heard said motion and argument of respective counsel and being now fully advised in the premises, doth overrule and deny said second motion. To which adverse decision and ruling of the Court in overruling and denying said second motion to quash, the defendant at the time duly excepted and excepts.

And thereupon the defendant being arraigned at the bar of this Court and required to plead to the averments of the information filed herein, charging him with violating the Live Stock Sanitary Laws of the State of Kansas, and said information being read to him and he fully understanding the same, for his plea thereto saith he is not guilty, which plea was by the Court accepted and directed to be entered of record. Thereupon a jury being called, there came twelve good and lawful men, duly summoned from the body of Labette County, Kansas, who were each and all duly empaneled and sworn to well and truly try the matters submitted to them in the trial of this cause and a true verdict give according to the law and the evidence.

And thereupon it appearing that the trial of this cause cannot be completed on this day for want of sufficient time, the jury was duly admonished by the Court as required by law, and allowed to separate until 9 o'clock A. M., December 9th, A. D. 1905.

16 In the District Court of Labette County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Motion to Quash Amended Information.

Comes now the defendant and moves the Court to quash, set aside and hold for naught the amended information filed in this case this day, and for an order directing the discharge of the defendant for the reason that said amended information does not charge the defendant with a public offense.

A. D. NEALE,
Attorney for Defendant.

Filed December 8, 1905.
EDWIN POTTS,
Clerk District Court.

And which motion was overruled, to which ruling of the court the defendant, at the time, duly excepted and excepts.
(See amended Information, next page.)

17 *Amended Information. Filed by Leave of Court.*

STATE OF KANSAS, *Labette County, ss:*

In the District Court in and for said County.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Information.

I, E. L. Burton, the undersigned County Attorney, of said County in the name and by the authority and on behalf of the State of Kansas come now here and give the Court to understand and be informed that on or about the 15th day of October, A. D. 1905, in said County of Labette and State of Kansas, one B. F. Asbell, did then and there unlawfully, willfully and intentionally bring, drive and transport 59 head of cattle, a further description of which affiant is unable to give into said Labette County and State of Kansas, from a point south of the South line of Kansas, to-wit: From a point in the Indian Territory, and said cattle were not brought into the State of Kansas for immediate Slaughter and the said B. F. Asbell did bring said cattle into Labette County and State of Kansas without having caused said animals to be inspected and passed under certificate of health by the Live Stock Sanitary Commission of the State of

Kansas, and did not have any inspection thereof and did not cause said cattle to be inspected by the Bureau of Animal Industry of the Interior Department of the United States Government and was not inspected by any inspector of the bureau of animal industry of the Interior Department of the United States Government, and this he the said B. F. Asbell did contrary to the form of the Statute *and* such case made and provided and against the peace and dignity of the State of Kansas.

E. L. BURTON,
County Attorney.

STATE OF KANSAS, *Labette County, ss:*

I, E. L. Burton, being duly sworn on oath say; that I am the County Attorney of said Labette County, Kansas; and that the allegations set forth in the within information are true to the best of my knowledge and belief.

E. L. BURTON.

18 Subscribed in my presence and sworn to before me by E. L. Burton this 8th day of December, A. D. 1905.

[SEAL.] EDWIN POTTS,
Clerk of the District Court.

STATE OF KANSAS, *Labette County, ss:*

I, J. McFall, being first duly sworn on oath say: that I have read the above and foregoing information and that the facts therein alleged are true. So help me God.

J. McFALL.

Subscribed in my presence and sworn to before me by J. McFall this 8" day of December, A. D. 1905.

[SEAL.] EDWIN POTTS,
Clerk of the District Court.

Endorsed: No. 1776. The State of Kansas, Pl'ff *vs.* B. F. Asbell, Def't. Amended Information. Filed Dec. 8, 1905. Edwin Potts Clerk Dist. Court, by Geo. T. Stice, Deputy. List of Witnesses: E. E. Scott; Henry Whitney; Chas. White; E. M. Rabes; H. Gertson; Mrs. H. Gertson; Mrs. Tomay; R. M. Buffington; J. McFall; John Mullunhour; —— Kimmons.

And after the overruling of the motion to quash the amended information, the said cause proceeded to trial before the court and a jury, and the following proceedings were had, in the following order, to-wit:—

19 December 9th, December Term, A. D. 1905. Sixth Judicial Day.

Court convened pursuant to its adjournment.

Present: Hon. Thos. J. Flannelly, Judge, Edwin Potts, Clerk, Frank Dienst, Sheriff, E. L. Burton, County Attorney, C. E. Vance, Reporter.

Thereupon the following proceedings were had and directed to be entered of record.

No. 1776.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Now on this 9th day of December, A. D. 1905, the same being a regular judicial day of the December, 1905, Term of said court, this cause came on for further trial. The plaintiff appeared by E. L. Burton, County Attorney, and W. A. Disch, Assistant, and the defendant appeared in person and by A. D. Neale, his attorney. Thereupon the trial of this cause proceeded. The plaintiff introduced evidence to maintain the issues on his part and rested its case, thereupon the Court instructed the jury as to the law governing the issues herein joined, and counsel for respective parties each addressed the jury. And the jury having heard all of the evidence adduced herein, the instructions of the Court, the argument of respective counsel and being now fully advised in the premises, were permitted and directed to retire to the jury-room in charge of a sworn bailiff, there to deliberate upon their verdict.

And thereafter the jury having agreed, returned into open court and presented their verdict, which is in words and figures as follows to-wit:

20 In the District Court of Labette County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Verdict.

We, the jury, find the defendant, B. F. Asbell, guilty of the crime of bringing and driving cattle into the County of Labette and State of Kansas from a point south of the south line of Kansas without having any inspection thereof, all as in manner and form charged in the information.

FRANK JONES, *Foreman.*

Which said verdict was by the Court duly accepted and directed to be entered of record, and the jury discharged from a further consideration of this cause.

21 In the District Court of Labette County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Be it remembered: That heretofore, to-wit, on the 8th day of December, A. D. 1905, the same being one of the regular judicial days of the regular December, 1905, term of the above named court, this cause came regularly on for trial, the plaintiff appearing by E. L. Burton, County Attorney, and the defendant appearing by A. D. Neale, his attorney, and a jury being duly impaneled and sworn, the following proceedings were had:

Thereupon the court duly admonished the jury as required by law and adjourned until 9 o'clock A. M. December 9th, 1905.

Which hour having arrived, all parties being present as before and the jurors each answering to their respective names, the following proceedings were had:

Thereupon Mr. Burton made opening statement on behalf of the plaintiff. And thereupon, the plaintiff, in order to maintain the issues on its part, introduced evidence as follows, to-wit:

HENRY WHITNEY, a witness introduced on behalf of the plaintiff, being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows, to-wit:

Direct examination.

By Mr. BURTON:

Q. Where do you reside, Mr. Whitney?

Defendant objects to the introduction of any evidence under the information in this case because it does not charge a public offense, and moves the court for a verdict in favor of the defendant upon the statement made by Counsel because it doesn't prove or at-
22 tempt to prove that the defendant is guilty of the charge made in this information.

Objection and motion overruled, to which rulings of the court defendant at the time duly excepted and excepts.

Q. State your name.
A. Henry Whitney.
Q. Where do you reside?
A. Chetopa.
Q. Are you acquainted with the defendant, B. F. Asbell?
A. Yes sir.
Q. Were you working for him during the month of October?
A. Yes sir.
Q. When did you commence to work for him?
A. I don't know. I think it was the first of September or before.
Q. Did you continue to work for him until after the 15th of October?

A. Yes sir; I did.
Q. Do you remember of going down to the Territory?
A. Yes sir.
Q. When was that?
A. On the 14th day of October.
Q. What day of the week was it?
A. Saturday.
Q. Who went with you?
A. Mr. Asbell and Charley White.
Q. How long before that had it been since Mr. Asbell had been down in the Territory?
A. He hadn't been there to my knowledge when I was there.
Q. Since you had been in his employ?
A. Yes, he did go once, but I don't know when it was.
Q. I wish you would give your best judgment about how long that was before you went down after these cattle?

Objected to by defendant, because he says he don't know anything about it.

23 Objection overruled, to which ruling of the court defendant at the time duly excepted and excepts.

Q. What is your best judgment about how long it was?
A. As near as I can tell, it must have been pretty nearly a month.
Q. What time in the day Saturday did you start down in the Territory?
A. In the morning some time.
Q. To whose place did you go?
A. To Mr. Rabe's.
Q. How far South of the Kansas line was Mr. Rabe's farm?
A. Somewhere between 2 and 3 miles, I think.
Q. What did you do on Sunday morning?
A. We rode over to where the cattle were. I don't know where they were. They were in a pasture about 3 miles from there,—and looked at the cattle.
Q. What direction was that from Mr. Rabe's place?
A. Southeast.
Q. What did you do after you got over to where the cattle were?
A. We separated the cattle that evening, Sunday evening. We rode over there and separated them on Sunday and then started them for his house.
Q. Started them for his house on Sunday?
A. Yes, sir.
Q. Where was Mr. Asbell's place located with reference to being in this county, or what county was it in?
A. Labette.
Q. What state?
A. Kansas.
Q. How far was Mr. Asbell's house North from the State line?
A. I think it was about 6 miles.
Q. What time on Sunday night did you arrive at Mr. Asbell's house?

A. About midnight some time.

Q. How many cattle did you bring with you from the Territory?

A. 59 head.

24 Q. What did you do with those cattle after they were brought to Mr. Asbell's place?

A. Put them in the pasture until the next morning.

Q. Where were they brought then?

A. I don't exactly know whether it was Monday or Tuesday we brought them to Oswego and put them in the stock yards.

Q. What was done with them then?

A. Along in the night some time they loaded them up and we went to Kansas City with them.

Q. Did you go to Kansas City?

A. Yes, sir; my mother lived up there, and he wanted to know if I wanted to go, and I told him yes.

Q. Was these the same cattle loaded at the depot that you brought from the Territory?

A. Part of them were. I don't know whether there was any others or not. We put them in with the others. He may have taken some of the others too.

Q. Who was present down there when you got the cattle together other than you and Mr. Asbell?

A. Mr. White and Mr. Ruble and another man that had cattle there in the same pasture.

Q. From the time you went down into the Territory to get these cattle until they were brought up into the State of Kansas, were they inspected by any state or government officer?

A. Not to my knowledge; no, sir.

Q. You were with them from the time they were taken out of the herd until they arrived on the Kansas line?

A. Yes, sir.

Q. And were driven into the state?

A. Yes, sir.

Q. What direction was Mr. Ruble's place from the City of Edna, or do you know where that is?

A. I don't know.

25 Cross-examination.

By Mr. NEALE:

Q. Did you ever see any cattle inspected?

A. No, sir.

Q. Do you know how they inspect them?

A. No, sir.

Q. Do you know who inspects them?

A. I don't know who inspects them down there.

Q. Don't know who inspects cattle?

A. The inspector, I suppose.

Q. You don't know whether these cattle were inspected or not, do you?

A. They were not inspected——

Q. Answer the question.
A. No, sir; I don't know.
Q. Don't know anything about it, do you?
A. (No answer.)
Q. Where do you say you live?
A. Chetopa.
Q. What is your given name?
A. Harry.
Q. Who did you say assisted in driving the cattle?
A. Mr. Asbell and Mr. White.
Q. Do you know whose cattle they were of your own knowledge?
A. I suppose Mr. Asbell's.
Q. I didn't ask you what you supposed. Do you know anything about it?
A. I know he told me they were his cattle, that is what he said.
Q. When did he say so?
A. It was on Friday when he spoke about going down the next day.
Q. Where was he when he spoke about these cattle being his?
A. At his place.
Q. Who was present?
A. I don't know as anybody was.
26 Q. What did he say?
A. He said he wanted to go after his cattle in the Nation and wanted me to go along and help drive them.
Q. Go after his cattle?
A. Yes, sir.
Q. Was that all he said?
A. He says I am going after my cattle and I want you to go along and help drive them.
Q. Who told you that?
A. Mr. Asbell.
Q. Who told you after Mr. Asbell did?
A. Nobody.
Q. Who has been talking to you about this case?
Q. Nobody.
Q. Nobody at all?
A. No, sir.
Q. Haven't you talked to anybody about it?
A. No sir.
Q. Not since it occurred?
A. Nobody only my cousin. I was telling him about it?
Q. Who is your cousin?
A. Ed Age——, at Chetopa.
Q. Who did you first tell about this?
A. They are the only ones, I think.
Q. Never told a so-le?
A. Not that I remember.
Q. Never even talked to Mr. Burton about it?
A. Not until yesterday.

Q. I thought you told me a while ago you had never talked with anybody?
A. I said till this court.
Q. You have talked with somebody about it?
A. Some; yes, sir.
Q. When did you do that?
27 A. Yes, sir.
Q. Were you subpœnaed as a witness?
A. Yes, sir.
Q. When?
A. Day before yesterday.
Q. Where were you?
A. I went out to Mr. Asbell's house.
Q. What for?
A. I went out there to see him about some work.
Q. Do you know Mr. McFall, this gentleman here?
A. I don't know. The first time I saw him was yesterday.
Q. Talk with him?
A. Not much of anything about the case.
Q. Did you talk to him about this case?
A. No, I can't say that I did.
Q. Do you remember whether you did or not?
A. I don't remember what was said.
Q. Do you remember anything that occurred yesterday?
A. Not talking to Mr. McFall, no, sir.
Q. How does it happen that you can't remember——
A. I was talking to him, but I don't know what was said.
Q. Were you here yesterday?
A. Yes, sir.

E. E. SCOTT, a witness introduced on behalf of the plaintiff, being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. BURTON:

Q. You may state your name?
A. E. E. Scott.
Q. Where do you reside?
A. I am boarding here at Oswego.
28 Q. What business are you engaged in?
A. Night operator of the Katy.
Q. Do you remember of seeing Mr. Asbell here in the City or the 15th of October or about that time?
A. Yes, sir.
Q. What was he doing here at that time?
A. Shipping some cattle out.
Q. Did you have any conversation with him with reference to these cattle?
A. Yes, sir.

Q. I wish you would state to the jury what was said between you and Mr. Asbell at the time he arrived there and how long he was there before the cattle were shipped out?

A. Well, he was there an hour, I should judge, before the cattle were shipped. I came on duty at 7 o'clock and Mr. Asbell was there when I came there. And we had the cars just ready to load and he was to load them and have them in readiness for the stock train that was coming as soon as No. 6 was gone. Mr. Asbell asked me to help him load the cattle, and I told him I wouldn't help him load them; so he went to load them himself, him and some boy, and he was gone about 10 minutes and came back and told me he wasn't going to ship the stock, and I asked him why, and he said Frank Dienst had told the boy they were liable to stop the stock in Parsons, so I told him I guessed Frank must have been joking, that I didn't know anything about it, but I thought if Frank did anything or was liable to cause him any trouble he would come to Mr. Asbell, and I rather thought it was a joke. So he went on to load the stock and was gone about 20 minutes and came back and said he guessed he wouldn't load the stock, that he was afraid that he would have some trouble about it. And at that time the train was coming, and I commenced to insist on his doing something, one of the two, load the stock or say so; I didn't want to hold a stock train,
so he studied around quite a little bit and said he guessed
29 he wouldn't load them. Of course I didn't know anything
about why he didn't want to load them. He said he had had so much trouble and didn't want to get into any trouble. And I say is there any reason why there should be any trouble about this stock, so he told me he had run the quarantine with the stock and guessed he would stop on account of further trouble. So I changed the billing of the stock and tagged the car uninspected Southern cattle and they went on. That was my instructions.

Q. Did you make out and give to Mr. Asbell the bill of lading of these cattle?

A. No, sir.

Q. That had been made out before you came there?

A. Yes, sir.

Q. Did he say to you who was the owner of the cattle?

Objected to by defendant, leading and suggestive.

Objection overruled, to which ruling of the court defendant at the time duly excepted and excepts.

Q. Did he tell you in that conversation who was the owner of the cattle?

A. Mr. Asbell?

Q. Yes, sir.

A. He told me they were his.

Cross-examination.

By Mr. NEALE:

Q. What else did he tell you?

A. That was about all that was said then.

Q. Did he say anything else except that?
A. I don't know.
Q. What was it? Tell the jury what it was.
A. That is all I recollect.
Q. Why can't you recollect the balance of it?
A. That was all that was said that I remember of.
30 Q. Why can't you remember something else that was said?
A. Because that was all that was said that I remember of.
Q. In what connection did he make use of that, they are my cattle?
A. Well, when he made the remark they were his cattle, when he came and asked me to help load the cattle, said he had two cars of cattle he wanted to load.
Q. Was that all he said?
A. Yes sir.
Q. All he said then was, I have got two cars of cattle down there I want to load?
A. Yes, sir.
Q. Was that all he said about the ownership of the cattle?
A. That was about all that he said.
Q. Why did you tell the jury he said they were his cattle?
A. I consider that calling them his.
Q. He didn't say that, did he?
A. I don't know what you would call it.
Q. How long was Mr. Asbell there at the depot?
A. He was there about an hour while I was there. I don't know how long before.
Q. Had you ever seen him before?
A. No, sir; I never saw him before.
Q. Where was it you had the first conversation with him?
A. There at the office of the Katy.
Q. Who commenced the conversation?
A. He did.
Q. What did he say first?
A. Came in and asked me to help him load the cattle.
Q. If he did that, he said something. What did he say?
A. He came in and asked me to help him load the cattle.
Q. Was that all he said?
A. Yes, sir.
Q. Asbell came in the office and *says* asked you to help load the cattle? That was all the conversation?
31 *Q.* Yes, sir; says I would like to get you to help me load these cattle?
Q. What did you say?
A. I refused. I was not in the business.
Q. What did you say?
A. I told him I was not employed to help anybody load cattle.
Q. What was the next thing that was said?
A. He went away and came back and asked me for a lantern.
Q. He said something. He asked you for a lantern, and what did you say?

A. I said all right.
Q. Did you let him have it?
A. I sure did.
Q. Then he went away?
A. Yes, sir.
Q. And came back?
A. Yes, sir.
Q. What did he say the next time he came back?
A. Said he didn't believe he would load the stock, didn't believe he would ship it.
Q. Was that all he said?
A. I asked him why and he told me about this trouble, about what Frank Dienst should have said.
Q. What was it?
A. Said Frank had told the boy that there was liable to be trouble about this stock and they might be stopped in Parsons.
Q. Was that all he said?
A. About all he said then, yes.
Q. Do you know that was all he said?
A. That is all I remember now.
Q. Did you say anything?
A. I told him I guessed not, that I thought if he had had anything against the cattle, if there was any chance of the stock being stopped at Parsons, he would have said so to Mr. Asbell.
32 Q. Why didn't you tell that a while ago when you were giving the conversation you had with him? Had you forgotten that?
A. I don't know as you asked me the question.
Q. You forgot that, did you, Mr. Scott?
A. I don't remember the whole of the conversation.
Q. You only remembered those particular things which you deemed of importance.
A. I remember a few things.
Q. Have you talked to Mr. Burton about this case?
A. I think so.
Q. You think so—don't you remember whether you did or not?
A. I have talked to several about the case.
Q. I asked you if you talked to Burton?
A. I might have said some things to Mr. Burton, I don't remember.
Q. You don't remember whether you did or not?
A. No, sir.
Q. How does it happen you can't remember conversations with Burton when you remember the conversation with Asbell?
A. I have talked to Mr. Burton a number of times, and I never talked with Mr. Asbell but once.
Q. When did you last talk to Burton?
A. I can't remember. I think yesterday I asked him if I was liable to be needed.
Q. Mr. Scott, did you ever talk with Mr. Burton and tell him what you knew about this case?

A. No, sir.

Q. Did you ever talk to him and tell him what you knew about this case?

A. No, sir. Not that I remember.

Q. Who did you talk with?

A. I talked with the agent and operator down there.

Q. Did you talk with anybody connected with the prosecution in this case?

A. I think not.

33 Q. After Mr. Asbell got this lantern, did he come back to the depot again?

A. Didn't come to the depot; no, sir.

Q. You didn't talk with him any more?

A. No, sir; didn't talk with him any more.

Q. Didn't talk with him any more?

A. No, sir—Yes, he did; he came back after he got the lantern.

Q. Did you have any other conversation?

A. Yes, sir.

Q. Who was present?

A. The boy and the conductor.

Q. Where was that at?

A. In the office.

Q. Who opened that conversation, you or Mr. Asbell?

A. It was a general conversation at that time.

Q. Nobody opened it then, or all opened it at once?

A. Well, they came and asked me to ask the agent about the cattle, so I phoned the agent and asked him what he thought about it, and he instructed me to tag the cattle southern cattle, and the conductor was there at the time.

Q. You say you phoned the agent?

A. Yes sir.

Q. Why didn't you tell Mr. Burton that a while ago? Did you forget that?

A. I don't remember of Mr. Burton asking about it.

Q. Your memory gets better as you proceed, does it?

Objected to by plaintiff.

The COURT: "The objection is sustained. I think the witness is trying to answer the questions fairly."

MR. NEALE: "I Except to the court suggesting before the jury that the witness is trying to answer the questions correctly."

The COURT: "The court objects to the tone and manner in which the attorney is asking the questions. The tone and manner in which the attorney is asking these questions is not in the

34 record, and I want the record to show that the court objects to it and will not permit it."

Q. Does your memory get better as you proceed as a witness.

Objected to by plaintiff, incompetent.

Objection sustained, to which ruling of the court defendant at the time duly excepted and excepts.

Mr. Neale: "I want the record to show that my manner was pleasant at that time, as pleasant as I can make it."

Q. Now, you had a conversation with the agent over the phone, did you?

—. ——.

Q. Did Mr. Asbell immediately leave the depot?
A. After the conversation?
Q. Yes sir.
A. Left shortly; yes, sir, in about 5 minutes, I guess.
Q. Did he come back any more?
A. No, sir.
Q. You are sure of that, are you?
A. Yes sir; he didn't come to the office. He came back to the caboose and got on the train.
Q. You saw him go back to the caboose?
A. Yes, sir.

Mary J. Tomay, a witness introduced on behalf of the plaintiff, being first duly sworn — testify the truth, the whole truth and nothing but the truth, testified as follows, to-wit:

Direct examination

By Mr. Burton:

Q. You may state your name.
A. Mary J. Tomay.
Q. Where do you reside?
A. Three miles and a half Southeast of Bartlett.
Q. Do you live near the line between the State of Kansas and the Indian Territory?
A. Live right on the line.
35 Q. Calling your attention to a time about the middle of October, do you remember of seeing Mr. Asbell?
A. Yes, sir.
Q. What day of the week was it?
A. Sunday.
Q. What was he doing in connection with others at that time?
A. I met him and he was driving cattle.
Q. Do you have any idea how many cattle there were?
A. No sir; I couldn't say because I didn't pay particular attention.
Q. Quite a number of just a few?
A. Quite a number.
Q. What direction was he driving the cattle?
A. East.
Q. On what line was it he was driving the cattle?
A. It was on the Territory and Kansas line, I suppose.
Q. On the section line known as the Kansas and Territory line?
A. Yes, sir.
Q. How long have you known Mr. Asbell?
A. About 25 or 30 years.

Q. Did you have any conversation with him?
A. No, sir.

Defendant declined to cross examine this witness.

J. W. MOLLENHOUR, a witness introduced on behalf of the state, being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows, to-wit:

Direct examination.

By Mr. BURTON:

Q. State your name.
A. J. W. Mollenhour.
Q. Are you acquainted with Mr. Asbell, defendant in this case?
A. Yes sir.
Q. How far do you live from his place?
36 Q. We just join corners with a cross road between us.
Q. How far from his residence?
A. About a mile and a quarter, I believe.
Q. Do you remember of his coming to your place along about the middle of October?
A. He stopped at my place on Saturday morning.
Q. Did you have any conversation with him?
A. Nothing more than he wanted to borrow a saddle.
Q. Did he tell you what he wanted to do with the saddle?
A. No sir.
Q. Did he tell you where he was going?
A. No, sir.
Q. Do you remember of having your attention attracted to something on Sunday evening?
A. Yes sir.
Q. What was that?
A. Somebody drove a bunch of cattle by there about 11 or 12 o'clock.
Q. At night?
A. Yes, sir.
Q. How large a bunch of cattle?
A. It was a pretty good sized bunch; but it was dark and I couldn't count them.

Cross-examination.

By Mr. NEALE:

Q. Who was it drove the cattle by?
A. To the best of my judgment from the voice that I heard it was Mr. Asbell's cattle.
Q. From the voice you judged it was Asbell's cattle, did you?
A. Yes, I thought I heard his voice.
Q. Did you recognize the voice of the cattle?
A. The voice of the man that was doing the hollering.
Q. The voices of the cattle didn't impress you as being his cattle?
A. The cattle didn't make no voice as anybody heard of.

37 J. A. McFALL, a witness introduced on behalf of the plaintiff, being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows, to wit:

Direct examination.

By Mr. BURTON:

Q. You may state your name.
A. J. A. McFall.
Q. Where do you reside, Mr. McFall?
A. Kingman, Kansas.
Q. What is your business?
A. I am working for the Live Stock Sanitary Commissioners.
Q. You are a deputy inspector, are you?
A. I am an inspector during the open season, and at other times of the year I am a patrolman along the South line of the State.
Q. Who has charge of the inspection of cattle by that board along the South line of Kansas and particularly along the South line of Labette County?
A. I have.
Q. Is there any other person who does that, that is, for the State Live Stock Sanitary Commission?
A. At the present time I have 2 or 3 local deputies along there attending to it for me.
Q. During the month of October of this year was there any one had charge of that work except you?
A. No, sir.
Q. Did you have exclusive charge of that?

Objected to by defendant, leading.
Objection overruled, to which ruling of the court defendant at the time duly excepted and excepts.

A. I was the only man that had anything to do with that line this last summer and fall, all summer and fall.
Q. How was it during the month of October?
38 A. Nobody else had anything to do with it.
Q. Did you inspect any cattle for B. F. Asbell during the month of October?
A. No, sir.
Q. Did you authorize any one on behalf of the Live Stock Sanitary Commission to inspect any cattle for Mr. Asbell?
A. No, sir.

Cross-examination.

By Mr. NEALE:

Q. What do you say your position is?
A. I say I inspect cattle during the open season and at other times of the year I am a Patrolman along the South line of the State.
Q. What do you call your office?
A. Cattle inspector.
Q. You are an inspector, are you?

A. Yes, sir.
Q. Under the board of commissioners——
A. Live Stock Sanitary Commissioners.
Q. Live Stock Sanitary Commissioners?
A. Yes, sir.
Q. You are under the commission?
A. Yes, sir.
Q. Your duties are those of an inspector?
A. During the open season.
Q. What do you call the open season?
A. Well, usually it is from the first of November to the first of February, but this year it was from the 15th of November to the first of February.
Q. From the 15th of November to the first of February, that you call the open season?
A. Yes sir.
Q. And during that season you are an inspector?
A. Yes, sir.
39 Q. What do you call your position during the balance of the year?
A. Patrolman.
Q. How many Patrolmen are there in this state?
A. I am the only one.
Q. When you are Patrolman, you are not Inspector?
A. There is no inspection done of cattle while I am Patrolman in my territory. There was no inspection done in the state from the first of February to the 15th of November this year and consequently they wouldn't be inspected.
Q. From the 15th of November?
A. From the first of February to the 15th of November this year. From the first of February to the 15th of November there was no inspection of any cattle from the Territory.
Q. During the time that you are an Inspector you are not a Patrolman?
A. Well, yes, I don't see why.
Q. That is what I want to know?
A. Yes, sir.
Q. Then you are inspector and patrolman at all times, are you?
A. Yes, sir.
Q. How many inspectors are there in this state, cattle inspectors?
A. Well, now——
Q. How many have you known of?
A. I think 7.
Q. Seven inspectors?
A. Yes, sir; during the open season.
Q. Who appoints those inspectors?
A. The Live Stock Sanitary Commissioner.
Q. His name is Baker?
A. Yes, sir; John S. Baker.
Q. What are the duties of the inspectors?
A. They are to admit cattle upon inspection.

Q. That is they inspect the cattle that are about to be brought into the state?

A. Yes, sir; and if they are found clean admit them; if not turn them back.

40 Q. Each inspector in the state has authority under the Live Stock Sanitary Commissioner to inspect cattle brought into the state from South of the South line of Kansas?

A. Yes, sir; during the open season.

Q. One of those inspectors has the same authority as another?

A. Yes, sir.

Q. So that an inspection by you would have the same force and effect as an inspection by any other inspector?

A. Yes, sir.

Q. And any inspection by any of the other seven inspectors would have the same effect and force as an inspection by yourself?

A. Yes sir.

Q. Each one of the inspectors under the Live Stock Sanitary Commissioner has authority to issue certificates of inspection?

A. Yes, sir.

Q. The Live Stock Sanitary Commissioner also issues certificates of inspection, can't he?

A. Yes, sir.

—. ——.

A. Well, my duties last——

Q. No, no. I didn't ask you that. I asked you what the duties of a patrolman were, not what you did. What are the duties?

A. To look after violations of law, and if any Texas fever breaks out, go and see how it came to break out and where it came from or originated, and all such as that.

Q. Do patrolmen inspect cattle?

A. Yes, sir; during the open season.

Q. And issue certificates of inspection?

A. Yes, sir; during the open season.

Q. You will observe, Mr. McFall, that I am not confining that to any particular occasion. I am simply asking you whether patrolmen as patrolmen issue certificates of inspection?

A. Yes, sir; I do.

Q. And do you know how many patrolmen there are in the state?

41 A. I am the only one that I know anything about.

Q. There may be others?

A. No, sir.

Q. How do you know.

A. The Sanitary Commissioner told me, and I expect he is pretty good authority.

Q. Is that all you know about it?

A. Yes, sir.

Defendant moves that that part of the testimony be stricken out, hearsay.

Motion sustained.

Q. So far as you—you don't know how many patrolmen there are, of your own knowledge, or have been in this state?

A. Not otherwise than what I have just answered. That is all I know about it.

Q. So far as your knowledge is concerned, you don't know anything about it?

A. No, sir.

Q. Don't know how many there may be?

A. No, sir.

Q. And each patrolman has the same authority to issue certificates of inspection?

A. Yes, sir.

Q. And inspectors the same as patrolmen?

A. Yes, sir.

Q. And the commissioner himself *and* same as inspectors and patrolmen?

A. I understand so.

Redirect examination.

By Mr. BURTON:

Q. What time of the year under the rules of the board are these inspection certificates permitted to be issued?

Objected to by defendant, incompetent.

42 Objection sustained.

Q. Do you know what time of year inspection certificates are issued by the Live Stock Sanitary Commissioner of this state?

A. Yes, sir.

Q. What time?

Mr. NEALE: "Do you get that from the rules and regulations?"

A. Yes, sir.

Mr. NEALE: "I object to that as incompetent."

Objection sustained.

Q. Have you a copy of the rules of the State Live Stock Sanitary Commissioner?

A. Yes, sir.

Plaintiff offered in evidence the official rules and regulations of the department of the Interior. (Exhibit A.) Objection by Defendant, incompetent, irrelevant and immaterial, not properly authenticated as required by the laws of this State, and the defendant has a right to be faced by the witness, and they can't bind him by anything of this kind.

Objection overruled, to which ruling of the court defendant at the time duly excepted and excepts.

Rule 13, which was the portion read to the jury, is as follows:

Rule 13. From the 1st day of February to the 31st day of October, inclusive of each year, no cattle shall be transported or driven or allowed to drift from the area quarantined by the Secretary of Agri-

culture for splenetic fever into any State or Territory or the District of Columbia or portion thereof outside of the said quarantined area, except as hereinafter provided. During the months of January, November and December of each year cattle from the area quarantined by the Secretary of Agriculture for splenetic fever may be shipped without restrictions other than those imposed by state or territorial officers at point of destination.

Defendant declined to offer any evidence, and the above and foregoing is the only evidence offered and received upon the trial. Pages 17 to 38 both inclusive.

43 And thereupon plaintiff rested its case.

And thereupon the defendant interposed his demurrer to the evidence adduced on behalf of the plaintiff, which demurrer is in the words and figures following, towit:

44 In the District Court of Labette County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Demurrer to Evidence.

Comes now the defendant at the close of the evidence for the State and demurs thereto, for the reason that the same does not prove a cause of action in favor of the State and against the defendant.

A. D. NEALE,
Attorney for Defendant.

Endorsed: No. 1776. The State of Kansas, *vs.* B. F. Asbell. Demurrer. Filed Dec. 9, 1905. Edwin Potts, Clerk Dist. Court.

And which said demurrer was, by the court, overruled, to which ruling and decision of the court the defendant, at the time, duly excepted and excepts.

And thereupon the defendant, before the court instructed the jury as to the law of the case, requested, in writing, that the court give to the jury instructions as follows, to-wit:—And which the court refused to do, to which refusal the defendant at the time duly excepted and excepts as to the refusal to give each and every of said instructions so requested, to-wit:—

45 In the District Court of Labette County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Instructions Requested by Defendant.

The defendant asks the court to give the jury the following instructions.

1st. You are instructed that under the evidence in this case you should find a verdict of not guilty.

2nd. You are instructed that before you will be authorized to find a verdict of guilty in this case the state must prove beyond a reasonable doubt that the defendant had knowledge of the rules and regulations of the State Sanitary Commissioner and the rules and regulations of the Bureau of Animal Industry, and that he knowingly and intentionally violated the same.

3rd. You are instructed that before you will be authorized to find a verdict of guilty you must find beyond a reasonable doubt that the defendant knowingly and intentionally violated the laws of this state.

4th. Intent to violate the law is necessary to be shown on behalf of the defendant before you will be authorized to convict.

5th. Criminal intent is necessary in all prosecutions by the state for violating its laws.

A. D. NEALE,
Attorney for Defendant.

Each of the above requests to charge refused by the court, to which ruling and decision the defendant, at the time excepted and excepts.

T. J. FLANNELLY, *Judge.*

46 Endorsed: State *vs.* Asbell. Instructions requested. Filed December 9, 1905. Edwin Potts, Clerk District Court, by Geo. T. Stice, Deputy.

And thereupon the court instructed the jury, in writing, which said instructions were in words and figures as follows, to-wit:—

47 In the District Court of Labette County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Instructions.

GENTLEMEN OF THE JURY: The averments of the information herein filed in this court on the 8th day of December, 1905, charge

that the defendant B. F. Asbell, did on the 15th day of October, 1905, at the County of Labette and within the State of Kansas unlawfully, willfully and intentionally bring, drive and transport 59 head of cattle a further description of which affiant is unable to give into said Labette County and State of Kansas, from a point south of the South line of Kansas, to-wit: from a point in the Indian Territory, and said cattle were not brought into the State of Kansas for immediate slaughter, and the said B. F. Asbell did bring said cattle into Labette County and State of Kansas without having caused said animals to be inspected and passed under certificate of health by the Live Stock Sanitary Commissioner of the State of Kansas and did not have any inspection thereof, and did not cause said cattle to be inspected by the Bureau of Animal Industry of the Interior Department of the United States Government and was not inspected by any inspector of the Bureau of Animal Industry of the Interior Department of the United States Government. Which information charges the defendant with a misdemeanor.

48 The defendant upon being arraigned and required to plead to the offense imputed to him for a plea thereto said he was not guilty; whereupon a plea of not guilty was ordered entered, and it is the question of the guilt or innocence of the defendant of the charge preferred against him that you have been impanelled to try, determine and declare by your verdict herein.

1. Of this charge and crime the said defendant is presumed to be innocent, until the contrary is proved; and he may, has the right to and does rest upon such presumption of innocence until every material allegation of said information, and every ingredient of the crime charged therein against him is proved by the evidence in this case, beyond a reasonable doubt. To this extent the law is a shield and protection to the defendant without evidence on his part; and it so stands until it is broken down or overcome by the evidence in this case, which satisfies you, beyond a reasonable doubt, that the defendant committed the crime, as charged in said information. If, therefore you entertain such doubts in this case upon any one or more facts or elements necessary to constitute said crime you must give the defendant the benefit of such doubt, and acquit.

2. A reasonable doubt is a doubt which has some reason for its basis, and is that state of the case which, after a full consideration of all the evidence, your minds are left in that condition that you cannot say you feel an abiding conviction of the guilt of the defendant. You should not go beyond the evidence to hunt for doubts, nor entertain them from mere caprice or conjecture. Such doubts should arise, if at all, only from a candid, fair and impartial consideration of all the evidence in the case.

3. An act is "unlawfully" done when done in violation of the rights of another and to his injury.

The word "Willfully" as used in the information means the crime or offense charged in the information was done purposely, intentionally—not accidentally.

49 4. The section of the Statute relating to the offense charged in the information in this case reads as follows:

SEC. 27. It shall be unlawful for any person or persons to bring, drive or transport any cattle into any county of the State of Kansas, except for immediate slaughter, as provided in the preceeding section, from any point south of the south line of Kansas, without having first caused such animal or animals to be inspected and passed upon certificate of health by the live stock sanitary commissioner of this state, or some inspector thereof, duly authorized by such commissioner, or by the bureau of animal industry of the Interior Department of the United States Government; and any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty nor more than one thousand dollars, or by imprisonment in the County jail not less than thirty days nor more than one year, or by both such fine and imprisonment.

5. Under the law of this state it is unlawful for any person to bring, drive or transport any cattle into any county of the State of Kansas from any point south of the south line of this state without first having the animals inspected. While the statutes permit cattle having southern ticks to be brought across the line, it is only for immediate slaughter, and then only under such rules and regulations as may be prescribed by the Live Stock Sanitary Commissioner.

5*a*. This law is designed for the protection of the health of the domestic animals of the state from all contagion or infectious deseases of a malignant character.

6. The defendant in this case is charged with violating the inspection law to which I have called your attention and so far as this case is concerned it is immaterial whether the animals were actually infected or not—the gist of this proceeding being the alleged failure to have any inspection before bringing cattle across the line.

In order to make its case, it is necessary for the State to prove

50 7. 1st. That the defendant brought the cattle or some part thereof into the county from any point south of the south line of this state.

2nd. That he brought the cattle across the line without first having caused the cattle to be inspected and passed under a certificate of health by the Live Stock Sanitary Commissioner of this state or some inspector thereof duly authorized by such commissioner, or by the Bureau of Animal Industry of the Interior Department of the United States Government, as charged in the information.

8. And if you believe from all the evidence, beyond a reasonable doubt, under the rules of law herein given you that the defendant did bring or drive any cattle into this county from any point south of the South line of this state without first causing such animal or animals to be inspected and passed under a certificate of health by the Live Stock Sanitary Commissioners of this state or some inspector thereof duly authorized by such commissioner or by the Bureau of Animal Industry of the Interior Department of the United States Government, all as in manner and form charged in the information,

then it will be your duty to find the defendant guilty as charged but if you do not so find and believe, you will acquit him thereof.

51 9. By the laws of this State, the defendant is a competent witness to testify in his own behalf, but he is not oblited to do so, and the fact of his not so testifying is not to be considered or construed by you as in any manner affecting the defendant's innocence or guilt, in this case.

Gentlemen of the jury, you are the exclusive judges of the facts established by the evidence in this case and of the credibility of the witnesses, and the weight which you will give to the evidence of each of them.

10. You are to determine from the appearance of the witnesses on the stand, their manner of testifying, their candor and fairness, the degree of intelligence they possess, their interest in the result of your verdict, their means of knowing of the facts whereof they have testified, their temper, feeling, bias or prejudice, if any has been shown, and from all other circumstances appearing on this trial which witnesses you will believe, and what weight you will give to the evidence of each. If the evidence of a witness has been fair, is not unreasonable or improbable, is consistent with itself, and the witness has in no way been impeached, then you have no right to disregard such evidence without cause. If you find any apparent conflict in the testimony in this case, it is your duty to reconcile all such, and all parts thereof, if reasonably possible, and give to each witness credit for truthfulness; but if you cannot do so, then you are to decide for yourselves whom you will believe. In case you find that a witness has deliberately and intentionally, or wilfully and corruptly, testified falsely to any material fact in the case, you may disregard and reject the entire evidence of such witness; but you are not obliged to do so, for a witness may be truthful as to a portion of his or her evidence, and false as to the balance.

Candidly consider the evidence free from passion and prejudice, fear or favor, and arrive at your verdict from all the evidence submitted to you, and from the law as the Court has given it you.

Designate one of your number as foreman, sign your
52 verdict by him and return it in open court. If you find defendant guilty, specify the offense. If you find for the defendant, your verdict will be a general one, finding the defendant not guilty. Forms of verdict in accordance with the instruction will be submitted to you.

THOS. J. FLANNELLY, *Judge.*

Dec. 9th, 1905.

Endorsed: Instructions. No. 1776. State of Kansas *vs.* B. F. Asbell. Filed Dec. 9, 1905. Edwin Potts, Clerk District Court.

53 And to the giving of which said instructions, and to each of them separately, the defendant, at the time, duly excepted and excepts.

The argument of the case then proceeded, the argument for the

plaintiff being made by W. A. Disch, deputy county attorney, who was followed by A. D. Neale for the defendant. The county attorney then proceeded to make the closing argument for the plaintiff.

During the argument of the county attorney in closing the case, he repeatedly asserted to the jury that "if the defendant in this case had had these cattle inspected he would have received a certificate, and he would have had that certificate here and would have produced it to the court and jury."

Counsel for the defendant objected to such statements being made to the jury, and to each of them, and moved the court to strike them from the jury and to direct the jury to disregard them, and each of them, but the objection- so made by the defendant were overruled, and the motion- made by defendant to strike them from the jury and to admonish the jury to disregard them, were also overruled, to all of which said rulings & decisions of the court the defendant at the time duly excepted and excepts, and his exceptions are allowed, and directed to be made a part of the record in this case.

And thereafter, and on the same day, Dec. 9, 1905, the jury rendered a verdict in said cause, finding the defendant guilty as charged, which verdict is in the words and figures following, and which was accepted by the court, and entered in the cause, to-wit:—

54 In the District Court of Labette County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Verdict.

We, the jury, find the defendant B. F. Asbell, guilty of the crime of bringing and driving cattle into the County of Labette and State of Kansas from a point south of the south line of Kansas without having any inspection thereof, all as in manner and form charged in the information.

FRANK JONES, *Foreman.*

Endorsed: No. 1776. The State of Kansas, Plaintiff *vs.* B. F. Asbell Defendant. Verdict Filed Dec. 9, 1905, Edwin Potts, Clerk Dist. Court, By Geo. T. Stice, Deputy.

55 And be it further remembered That thereafter, and after the rendition of the verdict finding the defendant guilty as charged in the amended information, and before judgment, the defendant filed in said court his motion to set aside the verdict of the jury, and for a new trial, which said motion, with all of the endorsements thereon, is in the words and figures following, to-wit:

56 In the District Court of Labette County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Motion for New Trial.

Comes now the defendant and moves the Court to set aside and vacate the verdict rendered herein this day and to grant to this defendant a new trial herein, for the reasons following to-wit:

First. Because the said verdict is not sustained by sufficient evidence and is contrary to law.

Second. Because of misconduct of the jury.

Third. Errors of law occurring at the trial and duly excepted to by the defendant at the time.

Fourth: Irregularity in the proceedings of the court, by which the defendant was prevented from having a fair trial.

Fifth. Because the court, over the objection and exception of the defendant and his attorney, permitted the attorney for the plaintiff to argue to the jury if the defendant had in his posses-ion a certificate of inspection he would have had the same in court, and would have presented the same to the court and jury as proof of his innocence.

Sixth. Because the court erred in refusing to quash the information.

Seventh. Because the court erred in overruling the objection to the introduction of evidence under the information.

Eighth. Because the court erred in not giving the instructions offered by the defendant.

Ninth. Because the court erred in not instructing the jury to find a verdict of not guilty under the opening statement made by the attorney for the state.

Tenth. Because of misconduct of the attorney for the State.

57 Eleventh. Because the court erred in admitting in evidence the printed rules and regulations of the Interior department regarding the introduction of cattle into this state.

Wherefore the defendant prays that the said verdict may be set aside and vacated and that he be granted a new trial of this action.

A. D. NEALE,
Attorney for Defendant.

Endorsed: No. 1776. The State of Kansas, Plaintiff, *vs.* B. F. Asbell, Defendant. Motion for New trial. Filed Dec. 9, 1905. Edwin Potts, Clerk Dist. Court. By Geo. T. Stice, Deputy.

And said defendant also filed a motion in arrest of judgment in said cause, which motion is in the words and figures as follows:—

58 In the District Court of Labette County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Motion in Arrest of Judgment.

Comes now the defendant B. F. Asbell, and moves the Court and asks that no judgment be rendered on the verdict of the jury finding the defendant guilty in the above entitled cause for the reasons following, to-wit:

First: Because the information and the several amended informations filed herein do not, nor does any of the said informations or the amended information state a public offense under the laws of the State of Kansas.

First: Because the facts as stated in the information and in the amended information and the evidence adduced upon the trial do not prove or state a public offense.

A. D. NEALE,
Attorney for Defendant.

Endorsed: 1776. The State of Kansas *vs.* B. F. Asbell. Motion in arrest of judgment. Filed Feb. 2, 1906. Edwin Potts, Clerk Dist. Court.

And the hearing of the said motion for a new trial was, by consent of the parties, continued until the 2nd day of February, 1906, one of the judicial days of said December, 1905, term of said court.

And on the said 2nd day of February, 1906, the said cause came on for further hearing on the said motions, and the following proceedings were had, in said cause, in said court, to-wit:—

59 In the District Court of Labette County, Kansas.

December 4th, December Term, A. D. 1905. First Judicial Day.

Court convened pursuant to Statutory Enactment.

Present: Hon. Thos. J. Flannelly, Judge. Edwin Potts, Clerk. Frank Dienst, Sheriff. E. L. Burton, County Attorney, C. E. Vance, Reporter.

February 2nd, 1906, December Term, 1905. Sixteenth Judicial Day.

Court convened pursuant to its adjournment.

Present: Hon. Thos. J. Flannelly, Judge. Edwin Potts Clerk, Frank Dienst, Sheriff, F. L. Burton, County Attorney, C. E. Vance, Reporter.

Thereupon the following proceedings were had and directed to be entered of record.

60 In the District Court in and for the County of Labette and State of Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Journal Entry.

Now on this 2nd day of February, A. D. 1906, the same being an adjourned day of the regular December, 1905 term of the District Court of the 14" Judicial District of the State of Kansas, sitting in and for the County of Labette, this cause came on for hearing on the motion for new trial heretofore filed for the defendant in this cause. The defendant appeared in person and by his attorney, A. D. Neale, and the plaintiff appeared by E. L. Burton, County Attorney.

After hearing the argument of counsel and being fully advised the court finds that said motion for new trial should and ought to be over-ruled.

It is therefore by the court considered, ordered, adjudged and decreed that the said motion for new trial be and the same is hereby over-ruled, to which ruling, decision and judgment of the court, the defendant at the time duly excepted and excepts.

Thereupon and upon the same day the said cause came on for further hearing upon the motion of the defendant in arrest of judgment, and the defendant appeared in person and by his attorney, A. D. Neale, and the plaintiff appeared by E. L. Burton, County Attorney.

After hearing the argument of counsel and being fully advised in the matter, the court doth find that said motion should and ought to be overruled.

61 It is therefore by the court ordered, adjudged and decreed, that the said motion in arrest of judgment be and the same is hereby overruled. To which judgment and decision of the court, the defendant at the time duly excepted and excepts.

Thereupon and upon the same day the defendant was arraigned at the bar of the said court, and required to state any reasons, if any he had, why the sentence and judgment of this court should not be imposed upon him upon the verdict of the jury heretofore rendered in this case, and no good and sufficient reasons appearing, why the sentence and judgment of the court should not be passed upon the defendant, the court proceeded to sentence him herein.

It is therefore by the court considered, ordered, adjudged and decreed that the defendant be confined in the County Jail, of Labette County, Kansas, for the period of thirty days; and that he pay a fine to the state of Kansas in the sum of $500, and pay the costs of this action taxed at $—, and that he be remanded to the custody of the sheriff of Labette County, Kansas, until the said decree and judgment of the court be fully carried out or he be discharged

by due course of law. To which judgment of the court, the defendant at the time duly excepted and excepts.

Thereupon the defendant made a written application to the Court for sixty days' time to make and prepare a bill of exceptions. And the court finding that said time was necessary in which to prepare and file a bill of exceptions, it was by the court ordered that the defendant have sixty days from this date in which to prepare his bill of exceptions herein, and the County Attorney at the time duly accepted notice of such extension — time. And the defendant thereupon asked the court to fix a stay bond to stay the execution of the judgment pending an appeal to the Supreme Court.

62 Thereupon the Court ordered that the execution of its judgment and sentence be stayed for the period of sixty days upon the defendant's filing a bond of $1000 with good and sufficient sureties as provided by law.

And thereafter, and upon the same day, the defendant gave to the clerk of said court, and to the county attorney of said county, notice of an appeal in this cause to the Supreme Court of the State of Kansas, which said notices are in words and figures following, to-wit:

63 In the District Court of Labette County, Kansas.

STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Notice to County Attorney to Labette County, Kansas, of Appeal to the Supreme Court of the State of Kansas.

To E. L. Burton, County Attorney of Labette County, Kansas:

You are hereby notified and will take notice that the above named defendant B. F. Asbell appeals from the judgment against him in the above entitled cause, to the Supreme Court of the State of Kansas, as provided by law.

A. D. NEALE,
Attorney for Defendant.

Service of the foregoing notice acknowledged this the 2nd day of February, 1906.

E. L. BURTON,
County Attorney, Labette County, Kansas.

Endorsed: No. 1776. The State of Kansas, Plaintiff *vs.* B. F. Asbell Defendant. Notice of appeal to Co. Atty. Filed Feb. 2, 1906. Edwin Potts, Dist. Clerk.

64 In the District Court of Labette County, Kansas.

STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Notice to Clerk of the District Court of Appeal to the Supreme Court.

To Edwin Potts, Clerk of the District Court of Labette County, Kansas:

You are hereby notified and will take notice that the above named defendant B. F. Asbell appeals from the judgment against him in the above entitled cause to the Supreme Court of the State of Kansas, as provided by law.

A. D. NEALE,
Attorney for Defendant.

Service of the above notice acknowledge- this 2nd day of February A. D. 1906.

EDWIN POTTS,
Clerk District Court, Labette County, Kansas.

Endorsed: No. 1776. State of Kansas, Plaintiff, *vs.* B. F. Asbell, defendant. Notice to Dist. Clerk of Appeal. Filed Feb. 2 1906. Edwin Potts Clerk Dist. Court by Geo. T. Stice, Deputy.

65 And upon the same day, to-wit:—February 2nd, 1906, the defendant filed in said court his motion for an extension of time in which to make, prepare, serve and file a Bill of Exceptions, which motion was sustained, and the defendant was thereupon given sixty days in which to make, prepare serve and file a Bill of Exceptions in this cause, and upon his application the execution in this cause was stayed upon the execution of a bond in the sum of one thousand dollars, with good and sufficient sureties.

Said motion for an extension of time is in the words and figures following, to-wit:—

66 In the District Court of Labette County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Motion for Extension of Time.

Comes now the defendant and moves the court for an extension of time in which to make, prepare, serve and file a Bill of Exception- in this cause for the period of sixty days from this date for

the reason that the court reporter is so crowded with business that he cannot prepare the record in this cause at an earlier period.

A. D. NEALE,
Attorney for Defendant.

Service of above motion acknowledged this 2nd day of February, 1906.

E. L. BURTON,
County Attorney, Labette County, Kansas.

Endorsed: 1776. The State of Kansas *vs.* B. F. Asbell. Motion to extend time to make bill of exceptions. Filed Feb. 2, 1906. Edwin Potts, Clerk Dist. Court.

Notice of which said extension of time was duly waived by the plaintiff and notice thereof accepted.

67 And thereafter, and on the 7th day of February, 1906, the said defendant filed in said court his bond in the sum of one thousand dollars, for a stay of execution as required by the order of the court, which said bond is in words and figures following, to-wit:—

68 In the District Court of Labette County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Appeal Bond.

Whereas the above named defendant, B. F. Asbell, was tried at the December Term, 1905, of the above named court, and on the — day of December, 1905, the jury returned a verdict of guilty.

And on the 2nd day of February, 1906, he was sentenced to pay a fine of $500.00, and to thirty days in the county pail, and to pay the costs of the prosecution, and the offense for which he was convicted and sentenced was bringing cattle from a point south of the Kansas line without being inspected.

And whereas at the time of the sentence the defendant served notice that he would appeal from the decision and judgment of said court and the said court ordered a stay of execution for sixty days giving said time to said defendant for him to prepare his bill of exceptions and perfect his appeal.

Now, therefore we the undersigned B. F. Asbell as principal and J. W. Marley as sureties are firmly bound unto the State of Kansas in the penal sum of One Thousand Dollars, and the express conditions of this bond are: that the above named defendant B. F. Asbell, will remain within the jurisdiction of this court and abide by any and all orders which the district court above named or the

Supreme Court of the State of Kansas may make on this cause; and should this case be remanded to the District Court, he will make a good and sufficient bond for his appearance and retrial. And should the judgment of the District Court be affirmed by the Supreme Court, that he will forthwith surrender himself to the Sheriff of Labette County to abide judgment and sentence in this cause; that if the defendant fail in any of these conditions this bond will be in full force and effect.

In witness whereof, we have hereunto set our hands this 7th day of February, 1906.

B. F. ASBELL.
J. W. MARLEY.

69 Approved by me this 7th day of February, 1906.

[SEAL.]

EDWIN POTTS,
Clerk District Court.

Endorsed: No. 1776. The State of Kansas, *vs.* B. F. Asbell. Appeal Bond. Filed Feb. 7th, 1906. Edwin Potts, Dist. Clerk.

70 And be it further remembered that thereafter, and on the 1st day of March, A. D. 1906, the said defendant duly filed in said court his notice of appeal to the Supreme Court of the State of Kansas, which said notice of appeal was directed to the clerk of the district court of said county, and to the county attorney of said county, and each of which said notices of appeal was accepted by the said officers respectively, and which said notice of appeal is in the words and figures following, to-wit:—

71 In the District Court of Labette County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Notice of Appeal by Defendant.

To Edwin Potts, Clerk of the District Court of said county, and E. L. Burton, County Attorney of said county:—

You and each of you are hereby notified that the defendant, B. F. Asbell, feeling aggrieved by the proceedings had and judgment rendered in the above entitled cause against him, hereby appeals from the said judgment and decree to the Supreme Court of the State of Kansas.

Dated this 1st day of March, A. D. 1906.

B. F. ASBELL, *Defendant,*
By A. D. NEALE,
Attorney for Defendant.

We and each of us do hereby accept service of the within and foregoing Notice of Appeal, this the 1st March, 1906.

EDWIN POTTS,
Clerk District Court.
E. L. BURTON,
County Attorney, Labette Co., Kansas.

Filed March 1, 1906.
EDWIN POTTS,
Clerk District Court.

72 In the District Court of Labette County, Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Stipulation.

It is hereby stipulated and agreed that the above and foregoing is a full, true and correct Bill of Exceptions in the above entitled cause, and is a full true and correct transcript of the record in the above entitled cause.

E. L. BURTON,
County Attorney, Labette Co., Kansas.
A. D. NEALE,
Attorney for Defendant, B. F. Asbell.

Filed Mar. 21, 1906.
D. A. VALENTINE,
Clerk Supreme Court.

73 *Judge's Certificate.*

Filed Mar. 21, 1906. D. A. Valentine, Clerk Supreme Court.

STATE OF KANSAS, *Labette County, ss:*

I, the undersigned, Judge of the District Court in and for said county and state, do hereby certify that the above and foregoing was, on the 10th day of March, A. D. 1906, presented to me as a Bill of Exceptions in the above entitled case of the State of Kansas *vs.* B. F. Asbell, and after examining the same I do further certify that the same is a complete, true and correct Bill of Exceptions in the said cause, and contains all the record in said cause, and all the evidence, and all the motions, orders, rulings, exceptions and other proceedings had in the said cause, including the instructions to the jury given by the court on its motion, and the instructions asked by the defendant and refused by the court.

And now, the plaintiff being present by E. L. Burton, County Attorney of said county, and the defendant being present by his

attorney A. D. Neale, the same is by me allowed and signed as a true, full and correct Bill of Exceptions in the said cause, and I hereby direct that it be attested and filed in said cause by the clerk of said court.

Witness by hand, in said county and state, this the 13 day of March, A. D. 1906.

THOS. J. FLANNELLY,
Judge District Court, Labette Co., Kansas.

STATE OF KANSAS, *Labette County, ss:*

I, Edwin Potts, Clerk of the District Court of Labette County, State of Kansas, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, this the 16th day of March, A. D. 1906.

74 EDWIN POTTS,
Clerk District Court, Labette Co., Kansas,
By GEO. T. STICE, *Deputy.*

[SEAL.]
Attest:
EDWIN POTTS,
Clerk District Court,
By GEO. T. STICE, *Deputy.*

Filed in my office this the 16 day of March, A. D. 1906.
EDWIN POTTS,
Clerk District Court,
By GEO. T. STICE, *Deputy.*

Filed Mar. 21, 1906.
D. A. VALENTINE,
Clerk Supreme Court.

75 Be it further remembered, that afterward on the 6th day of June, 1906, the same being one of the regular judicial days of the January 1906 term of the Supreme Court of the State of Kansas, said court being in session at its court-room in the city of Topeka, the following proceeding, among others, was had and remains of record in words and figures as follows, to-wit:—

76 In the Supreme Court of the State of Kansas.

No. 14874.

THE STATE OF KANSAS, Appellee,
vs.
B. F. ASBELL, Appellant.

Journal Entry of Submission.

This cause comes on to be heard on the notices of appeal and the transcript of the record of the district court of Labette county; and thereupon after oral argument by A. D. Neale for the appellant

and by E. L. Burton for the State, said cause is *submitted* on brief of counsel for both parties and taken under advisement by the Court.

77 Be it further remembered, that afterwards, on the 6th day of July, 1906, the same being one of the regular judicial days of the July, 1906 term of the Supreme Court of the State of Kansas, said court being in session at its court-room in the city of Topeka, the following proceeding was had and remains of record in the words and figures, following, to-wit:

78 In the Supreme Court of the State of Kansas.

No. 14874.

THE STATE OF KANSAS, Appellee,
vs.
B. F. ASBELL, Appellant.

Journal Entry of Judgment.

This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the court below be *affirmed.*

It is further ordered that the appellant pay the costs of this appeal in this court taxed at $12.05, and hereof let execution issue.

79 Be it further remembered, that on the same day, to-wit the 6th day of July, 1906, there was filed in the office of the clerk of the Supreme Court of the State of Kansas the syllabus and opinion of said court in this cause, which are in words and figures as follows, to-wit:

80 No. 14874.

THE STATE OF KANSAS
vs.
B. F. ASBELL.

Appeal from Labette County.

Affirmed.

Syllabus by the Court. Burch, J.

1. An information drawn under section 27 of chapter 495 of the session laws of 1905 relating to the inspection by the live stock sanitary commissioner of cattle imported from places beyond the south line of the state, which charges a want of inspection by the live stock sanitary "commission," and charges generally the want of any inspection, is not invalidated by the omission of the terminal syllable "er" from the word used to describe the official having power to make the inspection.

2. The statute referred to is a reasonable inspection law necessary for the protection of the cattle of the state against the ravages of contagious and infectious diseases, and is not invalid as a regulation of interstate commerce.

All the Justices concurring.
A true copy.
Attest:

____ ____,
Clerk Supreme Court.

81

No. 14874.

THE STATE OF KANSAS
vs.
B. F. ASBELL.

Appeal from Labette County.

Affirmed.

The opinion of the court was delivered by BURCH, *J.*:

Appellant was convicted of a violation of the law relating to the inspection of cattle brought into the state from points beyond its south line.

The information charged, among other things, that appellant brought cattle into the state from points south of its south boundary without having caused them to be inspected and passed under a certificate of health by the live stock sanitary commission of the state and that he did not have any inspection of them. This pleading was attacked by motion to quash and by motion in arrest of judgment on the ground that there is no longer any live stock sanitary commission in this state, the body formerly existing under that name having been superseded by a live stock sanitary commissioner, and that the general statement of a want of any inspection is insufficient.

There is no substantial difference between a commission composed of a body of individuals having lawful warrant to perform certain acts and a commissioner having identical authority. Both terms are general characterizations without fixed legal signification and import an office with prescribed duties. It is therefore very technical to say that the omission of the terminal syllable "er" marks a fatal distinction between a single person having power by himself and his subordinates to inspect cattle and issue health certificates, and all other men. Instead of this it merely discloses a slightly imperfect description of a well-known state official. Of course an information must state the offense charged with accuracy, precision and certainty; but it may do this in general terms. (State *v.* Finley, 6 Kan. 366.) The question is could the accused
82 have been mislead? (State *v.* McCord, 8 Kan. 232.) Hence, if the defect noted were serious, the general negative of any

inspection whatever fairly apprised appellant of the charge he was required to meet. Although this allegation was probably inserted for the purpose of showing a want of inspection by an inspector as distinguished from the commissioner it is broad enough to cover all persons; and whenever a negative is to be expressed general terms covering the entire subject matter will suffice. (1 Bishop's New Crim. Proc. Sec. 141.)

The action was instituted under section 27 of chapter 495 of the session laws of 1905, which reads as follows:

"It shall be unlawful for any person or persons to bring, drive or transport any cattle into any county of the state of Kansas, except for immediate slaughter, as provided in the preceding section, from any point south of the south line of Kansas, without having first caused such animal or animals to be inspected and passed under certificate of health by the live-stock sanitary commissioner of this state, or some inspector thereof, duly authorized by such commissioner, or by the bureau of animal industry of the Interior Department of the United States government; and any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty nor more than one thousand dollars, or by imprisonment in the county jail — by both such fine and imprisonment."

It is said the law is void because it prohibits bringing cattle into the state from below its south line at all seasons of the year, and whether they are diseased or not, unless inspected, and that the stock owner is placed at the mercy of the live stock sanitary commissioner who has power to admit or exclude cattle as he may see fit.

It is true that all cattle coming from the south must be inspected at all seasons of the year, but capricious conduct on the part
83 of the live stock sanitary commissioner is not contemplated. He has no discretion. He merely ascertains facts. If incoming cattle are healthy he passes them. If they are diseased he turns them back. Inefficiency or abuse of power in the administration of quarantine laws cannot be presumed. Inspectors are to be credited with proper capacity and proper motives until a case to the contrary is presented. Such an instance, if one should arise, would disclose conduct outside the purview of the offending individual's legal authority and could not be charged to the law itself. All human laws must be executed by fallible men but such laws are not on that account unrighteous.

The only question then is if the statute imposes an unreasonable restriction upon interstate commerce, the territory lying south of the south line of Kansas from which cattle may be brought into the state virtually being treated as an infected district.

The prevalence of Boophilus Bovis, or Southern Ticks, in the cattle country south of Kansas is a fact of common knowledge. The courts take judicial notice of it. (Grimes *v.* Eddy, 126 Mo. 168.) Recent scientific investigation shows that animals coming from portions of that region, at least, are always likely to be capable of communicating what is known as Texas, splenetic, or Spanish fever.

The liability of infection from animals coming from other parts is so great that it cannot be said the regulation is unnecessary to guard properly against the danger to be apprehended.

There is so great a dissimilarity between this statute and the one under consideration in the case of State *v.* Duckworth, 5 Idaho, 642, 51 Pac. 456, that the decision there made is not an authority. The prohibition upon importation is not absolute here as in the case of Railway Co. *v.* Husen, 95 U. S. 465. The discrimination between sections is based upon known conditions warranting it. The detention of cattle for inspection is not unduly burdensome. The cost of inspection is borne by the state itself. Cattle free
84 from disease are passed under a certificate of health. Hence the statute is sustainable under the well recognized power of the state to protect its livestock by reasonable inspection laws against the ravages of contagious and infectious diseases.

Some confusion between different provisions of the law relating to the general subject of livestock sanitation and inspection is pointed out, but the section quoted above is not affected and is sufficient to uphold the judgment of the district court.

Some minor questions are discussed. A reading of Rule 13 of the interior department of the United States shows that it could not have contributed to the verdict rendered without connecting evidence not found in the record. Hence the error in admitting it was harmless. The proof of every element of the offense charged was ample. The reference by the county attorney to the absence from the case of a certificate of inspection was not a reference to the failure of the defendant to testify. The instructions given are not printed in the brief as required by rule 10, and from what has been said it is apparent the instructions refused were rightfully refused.

The judgment of the district court is affirmed.

All the Justices concurring.

A true copy.

Attest:

____ ____,

Clerk Supreme Court.

85 And afterward, on the 23d day of July, 1906, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas a petition for a rehearing of this appeal, which petition is in words and figures as follows, to-wit:—

86 In the Supreme Court of the State of Kansas.

No. 14874.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Petition for Rehearing by Defendant.

Comes now the defendant B. F. Asbell and moves the court for a rehearing in this cause, and for cause therefor assigns the following reasons to-wit: First: This court on the 9th day of July A. D. 1906, handed down an opinion affirming the judgment of the district court of Labette county, in which court the defendant was sentenced to pay a fine of $500.00 and the costs of the prosecution and in addition thereto was sentenced to the county jail of said county for a period of thirty days for an alleged violation of section 27 of chapter 495 of the session laws of 1905, which reads as follows:

"It shall be unlawful for any person or persons to bring, drive or transport any cattle into any county of the state of Kansas, except for immediate slaughter as provided in the preceding section, from any point south of the south line of Kansas, without having first caused such animal or animals to be inspected and passed under certificate of health by the live stock sanitary commissioner of this state, or some inspector thereof, duly authorized by such commissioner, or by the bureau of animal industry of the Interior Department of the United States Government; and any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty nor more than one thousand dollars, or by imprisonment in the county jail not less than thirty days, nor more than one year, or by both such fine and imprisonment."

The information, as amended and upon which defendant was tried and convicted reads as follows: "I, E. L. Burton, the undersigned county attorney of said county come now here and give the court to understand and be informed that on or about the 15th day of October A. D. 1905, in said county of Labette and state of Kansas, one B. F. Asbell did then and there unlawfully, wilfully, intentionally bring, drive and transport 59 head of cattle, a further description of which affiant is unable to give, into said Labette county and state of Kansas, from a point south of the south line of Kansas to-wit: From a point in the Indian Territory, and said cattle were not brought into the state of Kansas for immediate slaughter, and the said B. F. Asbell did bring said cattle into Labette county and state of Kansas, without having caused said animals to be inspected and passed under certificate of health by the Live Stock Sanitary Commission of the State of Kansas, and did not have any Inspection thereof and did not cause said animals to be inspected by,

the Bureau of Animal Industry of the Interior Department of the United States Government and was not inspected by any inspector of the Bureau of Animal Industry of the Interior Department of the United States Government, contrary to the form of the statute."

This court in its opinion says "The information charged, among other things, that appellant brought cattle into the State from points south of its south boundary without having caused them to be inspected and passed under certificate of health by the live
87 stock sanitary commission of the state and that he did not have any inspection of them."

It is quite evident that this court is not familiar with the record in this cause, else it would never have said that the information charged that "there was no inspection." The information charges that the defendant brought the cattle into the state of Kansas "without having caused said animals to be inspected and passed under certificate of health by the live stock sanitary commission of the state of Kansas, and did not have any inspection thereof and did not cause said animals to be inspected by the bureau of animal industry of the interior department of the United States government, and was not inspected by any inspector of the bureau of animal industry of the interior department of the United States government." The information charges first; that the defendant did not have these cattle inspected by the live stock sanitary commission; second, that the defendant did not have any inspection thereof and did not cause said animals to be inspected by the bureau of animal industry of the interior department of the United States government; and third, that the defendant did not have these cattle inspected by any inspector of the bureau of animal industry of the interior department of the United States government. There is no attempt to charge that "no inspection" was *not* had. The phrase "and did not have any inspection thereof and did not cause said animals to be inspected by" in the information must necessarily be construed together, and is nothing more nor less than a charge that no inspection was had by the bureau of animal industry of the interior department.

Any other construction of this language would do violence to the language. The pleader simply charges that the defendant did not have any inspection thereof and did not cause said animals to be inspected by the bureau of animal industry. He has reference in this charge to but one thing; defendant did not have them inspected by the bureau of animal industry.

In this information he singles out certain parties, and then charges that those parties did not inspect these cattle. If it had been the intention of the pleader to have charged that there was no inspection, he could have easily charged that there was no inspection, not naming any parties who did not inspect, and possibly such pleading would have been sufficient under the decisions of
88 this state. But the very minute he attempts to charge that certain persons did not inspect, he must — the charge that each and every of the persons named in the statute did not inspect. This he failed to do. There is no charge in this information that

"an inspector of the commissioner, duly authorized," did not inspect these cattle.

In other words before an information can be sustained under this statute, it must charge that the defendant did not have the cattle inspected by the commissioner; it must also charge that the defendant did not have the cattle inspected by an inspector of the commissioner; it must also charge that the defendant did not have the cattle inspected by the bureau of animal industry of the interior department of the United States government.

While some courts hold that a general charge that the defendant did not have his cattle inspected would have been sufficient, all the courts hold so far as I have been able to find, that when the pleader attempts to charge that defendant did not have the cattle inspected by certain persons, such charge must include and specify all such persons. If it fails to do so it charges no crime.

This court has recognized this doctrine, and has held directly in line with it in the case of the State *v.* Pittman, 10 Kansas, 593, The Pittman case was for the violation of the liquor law, and it was charged that defendant sold liquor without having a certain kind of license. It did not charge that defendant did not have a license, but it did charge that he sold liquor without having a license "from the tribunal transacting the county business of said county of Neosho." The latter portion of the charge modified the former and this court held that such information did not charge an offense.

Regarding the necessity of negativing the fact of an inspection, the rule is "If there be any exceptions contained in the same clause of the act which creates the offense, the indictment must show negatively that the defendant or the subject of the indictment does not arise within the exception." State *v.* Thompson, 2 Kansas, 432.

In the case at bar the exception is contained in the same clause of the act which creates the offense. It is a part of it, so that the defendant could not be legally convicted if he had shown that he had his cattle inspected by an "inspector of the commissioner, duly authorized."

89 I wish to cite the court an argument used by counsel in the case of the State *v.* Pittman, 10 Kansas, at page 596: "In order then for a court to uphold this information as good, it must presume and infer that the defendant had been guilty of a criminal neglect of duty, and had not provided himself with a license (inspection) issued by some other tribunal possessed of equal authority, in that respect, with the tribunal named in the information; a presumption which a court will refuse to entertain. The information must be direct and certain, as it regards the party and the offense charged."

That argument was recognized as good law by this court in 1873 and I assume it will be so recognized by this court in 1906.

Apply that argument to the case at bar. The commissioner had the authority to inspect cattle, and it was charged in the information that he did not inspect them. An inspector of the commissioner had the same authority to inspect as the commissioner but it was not charged in the information that such inspector did not inspect

them. Will this court then assume that the defendant has been guilty of a criminal neglect of duty, and had not provided himself with an inspection issued by an inspector of the commissioner, who had equal authority with the commissioner?

This court in commenting on the information says that, "Hence, if the defect noted were serious (the failure to charge that the defendant did not have the cattle inspected by an inspector of the commissioner) the general negative of any inspection whatever fairly apprised appellant of the charge he was required to meet. Although this allegation was probably inserted for the purpose of showing a want of inspection by an inspector as distinguished from the commissioner, it is broad enough to cover all persons, and whenever a negative is to be expressed general terms covering the entire subject matter will suffice." And the court cites 1 Bishop's New Crim. Proc. sec. 141. (It is likely the court intended to say sec. 641, as 141 in that work does not touch the proposition.)

Sec. 641, cited, does not hold the doctrine contended for by the learned jurist writing the opinion, in this case. It simply holds that a negative in general terms, covering the entire substance of the matter will suffice. That *it* what this court held in the case cited, State *v.* Pittman. In that case had the information charged that defendant sold liquor without a license it would have been held good. But the very moment the pleader attempted to set out
90 certain persons, or a certain body from whom he did not obtain a license the court very properly held that each body that could issue a license must be stated, and that the mentioning of the one body did not include the other body that had like authority. Each must have been negatived. And in the case of Thompson *v.* State, 37 Ark. 408, cited under section 641 noted in the opinion, the supreme court of Arkansas held that if the offense consists of a sale without the prescription of a graduated physician or regular practitioner of medicine, the negation must extend to both classes of medical men.

In this state it is necessary for the state to prove that the defendant did not have his cattle inspected. That is one of the ingredients of the offense, and the burden of proof is upon the state to show that such inspection was not had. State *v.* Kuhuke, 26 Kans., 405; Territory of Kansas *vs.* Reyburn, McCahon, 135; Scott *v.* Lingren, 21 Kan. 184; State *vs.* Smith, 13 Kan. 274; State *v.* Pittman, 10 Kan. 593.

It being necessary to prove that inspection was not had, it is therefore necessary to allege that inspection was not had. If the information failed to allege that inspection was not had, the same would not charge an offense under the statute.

I call attention of the court to the case of State *v.* Pitzer, 23 Kan. 250. On page 252 the court says: "The state charged the selling not generally without any license therefor, but specially without a license in either of three forms. The inquiry therefore would be limited to those three forms." And in the last paragraph of that case on page 252 it is said: "It is true that the essence of all these forms of license is the authority to sell liquor and this fact was recognized in the case

just cited. So that if the indictment had negatived simply this essential element it would have been sufficient as hitherto stated. But where the pleader rests on the forms and not on the essence he must include all the forms. Suppose the indictment had charged the selling without a tavern keeper's license only would it not instantly occur to any one that the defendant might have a grocer's license as named in the dram shop act and so be guilty of no violation of law? The essence of each is the authority to sell liquor but charging the want of one does not negative the existence of the others."

And in the last case cited this court held that if a pleader attempt to negative the various forms of license by name, he should include all the forms and sources of license by which authority to sell the liquor may have been granted. (Explaining State *v.* Pittman, 10 Kan. 593.) And see Trost *v.* State, 64 Miss. 188.

91 The court in its opinion in the case at bar says that it was contended by the defendant "that the general statement of a want of an inspection in insufficient." With all due deference to this court I did not make any such contention, and the brief on file in this case, if read, will convince the court that no such contention was held. What I did contend was that it was not charged that no inspection was had. I took the position when this case was heard, and in my brief, and now that the information charges that no inspection was made by the live stock sanitary commission, and that no inspection was made by the bureau of animal industry of the interior department, and I still insist that it is not charged that no inspection was not made by other than those two persons.

I ask the court to look upon the brief filed in this case for the purpose of seeing the contentions held by defendant.

I ask the court to examine the case of State *v.* Thompson, reported in 37 Ark, at page 408, which I have heretofore cited herein.

This court in its opinion in this case says "A reading of rule 13 of the interior department of the United States shows that it could not have contributed to the verdict rendered without connecting evidence not found in the record." "Hence the error in admitting it was harmless." The court then admits that if it was material evidence the reading of such rule would have been serious error. I want to ask this court for what purpose the rule was introduced? It is true that there was nothing in the evidence connecting this rule 13 with anything, and for that reason it was error to admit it, as well said by this court; but leaving out of consideration rule 13, where is there any evidence in the record in this case that shows or even hints at the thought that defendant did not have his cattle inspected by the bureau of animal industry of the interior department? There is not a syllable even hinting that defendant did not have such inspection, if you leave out rule 13. Therefore the introduction of such rule in this case is error for which a new trial should be granted.

This court holds that "it is therefore very technical to say that the omission of the terminal syllable 'er' marks a fatal distinction between a single person having power by himself and his subordinates to inspect cattle and issue health certificates, and all other men." I did not so contend and do not now so contend. What I did con-

tend and what I now contend is this, a "commission" can act
92 only through some one given authority by the "commission"; but under the present statute (laws 1905) the "commissioner" is given authority himself to inspect cattle, and also any inspector of the commissioner. Under the law of 1901 a certificate issued by the "commission," under its seal would undoubtedly be sufficient or a certificate issued by an inspector of such commission would be sufficient. Any member of such commission could issue the certificate under the seal of the commission. In other words to place it in another way, it would not be necessary to prove that *each member* of the commission did not inspect, but only that no certificate was issued by the COMMISSION. Under the present law, the COMMISSIONER is given authority to inspect and before a conviction can legally be had there must be evidence that the inspection was not made by the COMMISSIONER. And what evidence is there in this record showing or even hinting at the thought that the COMMISSIONER did not inspect these cattle? Did any witness testify that the cattle were not inspected by the COMMISSIONER? If — who was it, and where can his testimony be found in this record?

I say without fear of successful contradiction that this court cannot place its finger upon one s-inctilla of evidence in this record either showing that these cattle were not inspected by the commissioner or that they were not inspected by the bureau of animal industry. The only witness on the question of inspection was McFall and he said he did not have any information or knowledge upon the subject as to an inspection of these cattle by the commissioner; and he knew nothing about federal inspection. And the counsel for the state in his oral argument in this case, before this court said that the rule 13 was introduced for the purpose of showing that there was no federal inspection.

Again this court says that the reference by the county attorney to the absence from the case of a certificate of inspection was not a reference to the failure of the defendant to testify. Certainly this court cannot have read aright the record in this case. I stand before a jury and point to a defendant on trial and say: "If this defendant had had these cattle inspected he would have had a certificate and would have shown it to the court and jury." Does this court mean to say that such language is not a reference to the failure of a defendant to testify? Who would have such certificate? Who could identify such certificate as the one received by defendant? Who would know that it covered the cattle charged not to have been inspected? No one on earth other than the de-
93 fendant. The language used by the county attorney called the attention of the jury to the fact that if such cattle had been inspected the defendant would produce his certificate of such inspection.

Defendant in this case thinks that the points raised by him should have some consideration; that if he is in error something should be said that is convincing, rather than a mere statement that there is nothing in his contentions. I have cited authorities upholding the contentions of the defendant, and upon the oral argument the

county attorney virtually admitted error, and simply wished the court to pass upon the constitutionality of the statute. No authorities are cited by this court, or by the state showing or attempting to show that the language of the county attorney was not an error for which the judgment should be reversed. Are there no authorities holding such language not to be erroneous? If there are no authorities on the subject cannot some reason be suggested why it is not erroneous, other than a simple statement that it *it* not erroneous? Are not the objections made to such argument entitled to some thought and some consideration? Where can a defendant go for the correction of such errors if not to this court?

A man's liberty is a sacred thing and a court should not assume his guilt until he is proven guilty beyond a reasonable doubt. The statute throws around him certain things for his protection and one of them is that if he does not testify the county attorney has no right to call attention of the jury to such failure to testify.

Suppose in this case the attorney for defendant had said to the court "I now offer in evidence a certificate of the live stock sanitary commissioner of this state, showing an inspection of these cattle." Would the court have admitted the same? Of course not. He would have sustained an objection to such offer until it was shown by the defendant that such certificate had been issued to defendant for the identical cattle in controversy in this action. Before such certificate would have been competent evidence I would have been compelled to place the defendant on the stand and show by him that he was the person to whom the certificate was issued, and that it was issued to cover the identical cattle in controversy. Is there any doubt about this proposition? If not, then there can be no doubt but that the argument of the county attorney called directly in issue the failure of the defendant to testify. The jury not to have thought so must have been wooden men, and without the power to think and reason. It has not yet gotten to the pass that Kansas juries are wooden men.

94 I feel that this case had not received the consideration at the hands of this court to which it is entitled. I feel that by the affirmance of the judgment a great injustice has been done the defendant. I feel that the court cannot be conversant with the record else it would never have consented to an affirmance. I feel that if the defendant is in error as to his objections to the judgment and this court finds that no error was committed, the defendant is entitled, as a citizen and tax payer of this state to have some reasons assigned by this court for its holdings other than a simple statement that there is no error.

I have perhaps extended this petition more than I should have done; but the excuse is found in the fact that I am convinced that there are questions in this case which received but scant consideration which should have received full consideration; that the judgment is radically wrong, and cannot be sustained by either reason or authority.

The defendant also insists that the statute under which the information was attempted to be drawn is not constitutional and for that

reason the judgment should have been reversed and the defendant discharged.

Whatever may be said with reference to the guilt or innocence of this particular defendant he is certainly entitled to stand upon the presumption of innocence until his guilt is proven beyond a reasonable doubt, and certainly no man, lawyer or layman can examine the evidence in this case and carefully consider the same and then conclude the state has proven its case.

For the reasons suggested it is respectfully, but with earnestness submitted that this court should set aside the order of affirmance heretofore entered herein, reverse the judgment and remand the case.

A. D. NEALE,
Attorney for Defendant.

Chetopa, Kansas, July 20, 1906.

95 And afterwards, on the 6th day of October A. D. 1906, the same being one of the regular judicial days of the July, 1906 term of the Supreme Court of the State of Kansas, said court being in session at its court-room in the city of Topeka, the following proceeding was had and remains of record, to-wit:—

96 In the Supreme Court of the State of Kansas.

14874.

THE STATE OF KANSAS, Appellee,
vs.
B. F. ASBELL, Appellant.

Now comes on for decision the petition for a rehearing of this cause; and thereupon it is ordered that said petition be denied.

97 In the Supreme Court of the State of Kansas.

14874.

THE STATE OF KANSAS, Appellee,
vs.
B. F. ASBELL, Appellant.

I, D. A. Valentine, clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all pleadings and papers filed, and all proceedings had in the above entitled cause, as the same now remain on file and of record in my office.

Witness my hand and the seal of the Supreme Court of the State of Kansas hereto affixed at my office in Topeka, this 26th day of November, A. D. 1906.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

98 Hereafter follows the petition for a writ of error, and assignments of error; the order allowing the writ of error and fixing the supersedeas bond; the writ of error and the allowance thereof; citation together with the proof of service thereof and a copy of the supersedeas bond together with the order of stay thereunder.

99 In the Supreme Court of the State of Kansas.

No. 14874.

THE STATE OF KANSAS, Plaintiff,
vs.
B. F. ASBELL, Defendant.

Petition for Writ of Error, and Assignment and Prayer.

Considering himself aggrieved by the final decision of the Supreme Court in rendering judgment against him in the above entitled case, the defendant hereby prays a writ of error from the said decision and judgment to the United States Supreme Court, and an order of this court fixing the amount of a supersedeas bond.

And the said defendant, B. F. Asbell, assigns the following errors in the records and proceedings in said case:

The Supreme Court of Kansas erred in holding and deciding that section 27 of Chapter 495, Session laws of Kansas, 1905, was valid.

The validity of said section was denied and drawn in question by the defendant on the ground of its being repugnant to the Constitution of the United States, and in contravention thereof.

The said error is more particularly set forth as follows:

The Supreme Court of Kansas erred in holding and deciding—

First. That said section 27 was not an unreasonable restriction upon interstate commerce, as guaranteed by Section 8, article
100 I, of the Constitution of the United States, and in holding and deciding that said section did not violate that part of section 2, article 4, of the Constitution of the United States which reads "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

For which errors the defendant, B. F. Asbell, prays that the said judgment of the Supreme Court of the State of Kansas, dated July 6 1906 be reversed, and for the costs of this proceeding, and such other relief as to the court may seem just.

NELSON CASE,
Attorney for B. F. Asbell, Defendant.

STATE OF KANSAS, *Supreme Court, ss:*

Let the writ of error issue upon the execution of a bond by B. F. Asbell, to the State of Kansas, in the sum of $2500.00 such bond, when approved, to act as a supersedeas.

Dated at Topeka, Kansas, November 3d 1906.

W. A. JOHNSTON,
Chief Justice, Supreme Court of Kansas.

101 [Endorsed:]. 14874 State *v.* B. F. Asbell Petition for Writ of error & Assignments of error Filed Nov. 3 1906. D. A. Valentine Clerk Supreme Court.

102 In the Supreme Court of the State of Kansas.

At Chambers, Before Johnston, C. J.

SATURDAY, *Nov.* 3, '06.

No. 14874.

THE STATE OF KANSAS, Appellee,
vs.
B. F. ASBELL, Appellant.

B. F. Asbell the appellant herein having presented his application for a writ of error to the Supreme Court of the State of Kansas, to correct the judgment rendered by said Court against him in — suit wherein he was appellant and the said State of Kansas is appellee, and having presented with said application his due assignment of errors in that regard, and presented a citation to be signed accordingly, it is ordered that said writ of error be allowed and said citation signed. It is further ordered that the appellant give to the State of Kansas good and sufficient security in the sum of Twenty five hundred ($2500.00) Dollars. That the said appellant shall prosecute his writ of error to effect, and if he fail to make good his plea shall answer all damages, and costs, of that said security after being approved by me, and a writ thereunder given as a supersedeas.

103 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said court before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between The State of Kansas and B. F. Asbell, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said state on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, Treaty, Statute

or Commission; a manifest error hath happened to the great damage of the said B. F. Asbell as by his complaint appears. We being willing that error if any hath been should be duly corrected and full and speedy justice be done the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record of the things aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this Writ so that you have the same in the said Supreme Court at Washington within Thirty days from the date hereof. That the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable, Melville W. Fuller, Chief Justice of the United States the 31 day of November, in the year of our Lord 1906.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT,
Clerk, Circuit Court United States, District of Kansas.

Allowed:
W. A. JOHNSTON,
Chief Justice, Supreme Court of Kansas.

[Endorsed:] 14874 State of Kansas *v.* B. F. Asbell Writ of error Filed Nov. 3 1906. D. A. Valentine Clerk Supreme Court.

104 Filed Nov. 9, 1906. R. A. Valentine, Clerk Supreme Court.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the State of Kansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Kansas, wherein B. F. Asbell is plaintiff in error, or appellant, and you are defendant in error, or appellee, to show cause, if any there be, why the judgment rendered against the plaintiff in error or appellant as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the chief justice of the Supreme Court of the State of Kansas, this 3rd day of November, A. D. 1906.

W. A. JOHNSTON,
Chief Justice, Supreme Court of Kansas.

[Seal Supreme Court, State of Kansas.]

Attest:
D. A. VALENTINE,
Clerk Supreme Court of Kansas.

TOPEKA, KANS., *Nov.* 3, 1906.

I, the Attorney General, of the State of Kansas, and attorney of record for the State of Kansas, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

C. C. COLEMAN,
Attorney General of State of Kansas.

105 [Endorsed:] 14874 State *v.* Asbell Citation Filed Nov. 9, 1906 D. A. Valentine Clerk Supreme Court.

106 In the Supreme Court of the State of Kansas.

STATE OF KANSAS, *County of Labette, ss:*

Bail Bond, Pending Writ of Error.

We, B. F. Asbell and J. W. Marley and C. M. Condon jointly and severally acknowledge ourselves indebted to the United States of America in the sum of twenty five hundred ($2500.00) dollars, lawful money of the United States of America, to be levied upon our and each of our goods, chattels, lands and tenements, upon this condition:

Whereas the said B. F. Asbell has sued out a writ of error from the judgment of the Supreme Court of the State of Kansas in the case in said court wherein the State of Kansas is appellee, and the said B. F. Asbell is appellant for a review of said judgment in the United States Supreme Court, said case having been appealed to the Supreme Court of the State of Kansas by said B. F. Asbell from a judgment of the district court of Labette County, Kansas;

Now, if the said B. F. Asbell shall appear and surrender himself in the district court of Labette County, Kansas, on and after the filing in said district court, or in the Supreme Court of the State of Kansas, of the mandate of the said the Supreme Court of the United States, and from time to time thereafter, as he may be required, to answer any further proceedings and abide by and perform any judgment or order for the payment of costs or otherwise which may be had or rendered against him in the Supreme Court of the United States of America, and abide by and perform any judgment or order which may be had or rendered against him in the Supreme Court of the State of Kansas, or in the district court of Labette County, Kansas, and not depart from said district court without leave thereof, then this obligation shall be void, otherwise to r ..ain in full force and virtue.

Witness our hands and seals this the 20th day of November, A. D. 1906.

B. F. ASBELL.
J. W. MARLEY.
C. M. CONDON.

107 STATE OF KANSAS, *County of Labette, ss:*

J. W. Marley surety on the within and foregoing bond being duly sworn says that he is a resident of said Labette County; that he is worth the sum set opposite his name over and above his debts, exemptions and liabilities; so help him God.

C. M. CONDON, $2000.
J. W. MARLEY, 1000.

Subscribed and sworn to before me this — day of November, 1906.

——— ———,
Notary Public.

Commission expires———

Taken and approved by me this 23*th* day of November, A. D. 1906.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

(Endorsed:) A good bond and sufficient sureties, Nov. 17, 1906. E. L. Burton, County Att'y Labette Co., Kansas. No. 14,874. State *vs.* Asbell Bond and Supersedeas. Filed Nov. 23, 1906, D. A. Valentine, Clerk Supreme Court.

108 In the Supreme Court of the State of Kansas.

Before Johnston, C. J., at Chambers.

FRIDAY, *Nov.* 23, '06.

No. 14874.

THE STATE OF KANSAS, Appellee,
vs.
B. F. ASBELL, Appellant.

A Writ of Error from the Supreme Court of the United States to review the judgment against the said B. F. Asbell heretofore rendered in this case having been lodged with the Clerk of this Court, citation also having been signed and served and a bond in the sum of $2500.00 given as supersedeas of said judgment, having been approved, and filed this day with the Clerk of this Court it is, upon motion of said B. F. Asbell who has sued out said Writ of Error, ordered that no Mandate issue in this case until said Writ of Error shall have been determined, and until the further order of this Court.

109 In the Supreme Court of the State of Kansas.

I, D. A. Valentine, clerk of the said court, do hereby certify that there was lodged with me as such clerk on November 3rd and November 23rd A. D. 1906, respectively, in the case of The State of Kansas *vs.* B. F. Asbell

1. Two copies of the writ of error as herein set forth, one for the appellee, The State of Kansas, and one to file in my office;
2. The original bond of which a copy is herein set forth.

In witness whereof I have hereunto set my hand and affixed the seal of said court at my office in Topeka, Kansas, this 26th day of November, A. D. 1906.

[Seal Supreme Court State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

110 UNITED STATES OF AMERICA, *ss:*

Supreme Court of Kansas.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said Supreme Court of Kansas, in the City of Topeka, this 26th day of November, A. D., 1906.

[Seal Supreme Court State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No. 20,481. Kansas supreme court. Term No. 166. B. F. Asbell, plaintiff in error, *vs.* The State of Kansas. Filed December 7th, 1906. File No. 20,481.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

B. F. ASBELL,
PLAINTIFF IN ERROR,
vs.
THE STATE OF KANSAS.

No. 195.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR THE PLAINTIFF IN ERROR.

ARCHIE D. NEALE,
ATTORNEY FOR PLAINTIFF IN ERROR.

CHETOPA, Kans., January 1, 1908.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

B. F. ASBELL,
PLAINTIFF IN ERROR,
vs.
THE STATE OF KANSAS.

No. 166.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR THE PLAINTIFF IN ERROR, B. F. ASBELL.

STATEMENT OF THE CASE.

This is a criminal prosecution instituted by the State of Kansas against the plaintiff in error, B. F. Asbell, in the District Court of Labette County, Kansas,

wherein he was charged with a violation of Section 27, Chap. 495, Laws of 1905, and being general section 8180, General Stat. of Kansas, 1905, and which section reads as follows:

"Sec. 8180, Par. 103. It shall be unlawful for any person or persons to bring, drive or transport any cattle into any county of the state of Kansas, except for immediate slaughter, as provided in the preceding section, from any point south of the south line of Kansas, without having first caused such animal or animals to be inspected and passed under certificate of health by the live stock sanitary commissioner of this state, or some inspector thereof, duly authorized by such commissioner, or by the bureau of animal industry of the Interior Department of the United States Government; and any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty nor more than one thousand dollars, or by imprisonment in the county jail not less than thirty days nor more than one year, or by both such fine and imprisonment."

The amended information upon which the trial was had in the district court reads as follows:

Title omitted.

"I, E. L. Burton, the undersigned county attorney of said county, in the name and by the authority and on behalf of the State of Kansas, come now here and give the court to understand and be informed that on or about the 15th day of October, A. D. 1905, in said county of Labette and State of Kansas, one B. F. Asbell did then and there unlawfully, wilfully and intentionally bring, drive and transport 59 head of cattle, a further description of which affiant is unable to give, into said Labette County and State of Kansas, from a point south of the south line of Kansas, to wit: From a point in the Indian Territory, and said cattle were not

brought into the state of Kansas for immediate slaughter, and the said B. F. Asbell did bring said cattle into Labette County and State of Kansas without having caused said animals to be inspected and passed under certificate of health by the Live Stock Sanitary Commission of the State of Kansas, and did not have any inspection thereof and did not cause said cattle to be inspected by the Bureau of Animal Industry of the Interior Department of the United States Government, and was not inspected by any inspector of the Bureau of Animal Industry of the Interior Department of the United States Government, and this he, the said B. F. Asbell, did contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Kansas."

Trans. p. 8.

Upon the trial of this cause the court instructed the jury as follows:

"The defendant in this case is charged with violating the inspection law to which I have called your attention and so far as this case is concerned it is immaterial whether the animals were actually infected or not, the gist of this proceeding being the alleged failure to have any inspection before bringing cattle across the line."

Trans. p. 29, par. 6.

And the court further instructed the jury:

"In order to make its case, it is necessary for the state to prove, 1st: That the defendant brought the cattle or some part thereof into the county from any point south of the south line of this state. 2nd: That he brought the cattle across the line without first having caused the cattle to be inspected and passed under a certificate of health by the Live Stock Sanitary Commissioner of this state or some inspector thereof duly authorized by such commissioner, or by the Bureau of Animal Industry of the Interior Department of the

United States Government, as charged in the information."

Trans. p. 29.

And the court further instructed the jury:

"8. And if you believe from all the evidence, beyond a reasonable doubt, under the rules of law given you that the defendant did bring or drive any cattle into this county from any point south of the south line of this state without first causing such animal or animals to be inspected and passed under a certificate of health by the Live Stock Sanitary Commissioner of this state or some inspector thereof duly authorized by such commissioner or by the Bureau of Animal Industry of the Interior Department of the United States Government, all as in manner and form charged in the information, then it will be your duty to find the defendant guilty as charged, but if you do not so find and believe, you will acquit him thereof."

Trans. p. 29.

The defendant moved the court to quash the information filed against him for the reason that the same did not charge him with a public offense (Trans. p. 6); but the court overruled the motion, and permitted the State to file an amended information.

Trans. p. 7.

The county attorney thereupon filed an amended information, upon which amended information the defendant was tried.

Trans. p. 8.

The defendant filed his motion to quash the amended information for the reason that said amended information did not charge a public offense, but the court overruled and denied such motion.

Trans. p. 8.

Upon the trial of the case before the court and a jury, the defendant was adjudged "guilty of the crime of bringing and driving cattle into the county of Labette and state of Kansas from a point south of the south line of Kansas without having any inspection thereof, all as in manner and form charged in the information."

Trans. p. 31.

The defendant filed in the district court his motion to set aside and vacate the verdict of the jury, and for a new trial (Trans. p. 32); but the court overruled the said motion, and sentenced the defendant on said verdict to confinement in the county jail of said Labette county for the period of thirty days, and that he pay a fine to the state of Kansas in the sum of $500.00, and pay the costs of the action.

Trans. p. 34.

From the judgment so rendered against him he perfected an appeal to the Supreme Court of the State of Kansas, which court on the 6th day of July, A. D. 1906, affirmed the judgment of the district court of Labette county.

Trans. p. 41.

Thereafter, and on, to wit: July 23rd, 1906, the defendant filed in the office of the Clerk of the Supreme Court of Kansas his petition for rehearing.

Trans. pp. 45-52.

On the 6th day of October, 1906, the Supreme Court of Kansas denied the said petition for rehearing.

Trans. p. 52.

Subsequently, on the 3rd day of November, 1906, the cause was removed to this court by writ of error allowed and ordered by Mr. Chief Justice Johnston, of the Supreme Court of Kansas, upon the execution of a bond in the sum of $2500.00, such bond, when approved, to act as a supersedeas.

Trans. p. 53.

Upon this writ of error the plaintiff in error filed an assignment of errors in the Supreme Court of Kansas.

Trans. p. 53.

SPECIFICATION OF ERRORS.

FIRST.—Said court erred in holding and deciding that Section 27 of Chapter 495, Session Laws of Kansas, 1905, was a valid enactment.

SECOND.—Said court erred in holding and deciding that Section 27 of Chapter 495, Session Laws of Kansas, 1905, was not an unreasonable restriction upon interstate commerce, as guaranteed by subdivision three, of section 8, of article 1, of the constitution of the United States.

THIRD.—Said court erred in holding and deciding that Section 27 of Chapter 495, Session Laws of Kansas, 1905, was not violative of that part of section 2, article 4, of the constitution of the United States, which reads as follows: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

FOURTH.—For the above reasons said court erred in affirming the judgment of the district court of Labette county, Kansas, in this case.

BRIEF AND ARGUMENT.

It will be observed that the amended information in this case, and upon which defendant was tried, charges that the defendant brought certain cattle into the county of Labette, from a point south of the south line of Kansas, and that said cattle were not brought in "for immediate slaughter," and that the same were brought into said county without having been inspected and passed under a certificate of health by the Live Stock Sanitary Commission of the state, or by the Bureau of Animal Industry of the Interior Department of the United States Government, etc.

The district court instructed the jury that the only things necessary for the state to prove, in order to justify the conviction of the defendant, were that the defendant brought the cattle or some of them into the state from a point south of the south line of the state; and that such act was done without an inspection.

The Supreme Court of Kansas, in affirming the judgment of conviction, held—

"The statute referred to is a reasonable inspection law necessary for the protection of the cattle of the state against the ravages of contagious and infectious diseases, and is not invalid as a regulation of interstate commerce."

Trans. p. 42.

From the record it will be observed that if the defendant brought into Labette county cattle from below the south line of the state of Kansas, without inspection, he would be guilty under the statute. So held the district court, and the Supreme Court of Kansas agreed

with such holding, and in addition held the statute constitutional.

The jury found that the defendant did bring certain cattle into Labette county, without inspection. The question as to whether the cattle were diseased was excluded by the trial court, that court telling the jury that "it is immaterial whether the animals were actually infected or not."

Trans. p. 29, par. 6.

It was not claimed by any one, and there was no evidence showing or tending to show, that the cattle in question, or any of them, were infected with any disease, or that they were liable to impart any disease to any of the animals in this state. The evidence showed or tended to show that the defendant, Asbell, lived in Labette county; that he had some cattle which he sent to the territory to pasture; that thereafter he went down and brought them back to his farm, and then took such cattle with others he then had in his pasture in this county, drove them to Oswego (the county seat of this, Labette county) and loaded them into a car and shipped them to Kansas City, Mo. The pasture in the Indian Territory (now Oklahoma) was about three miles from the south line of the state of Kansas.

For the purpose of what I may have to say the testimony thus stated will probably be sufficient and will not be controverted by the state.

The statute under consideration prohibits the driving, bringing or transporting of *any* cattle into any county of the state of Kansas, *at any time of the year*, without having them first inspected.

Under this statute it would make no difference whether the cattle brought in were diseased or not; they might be perfectly healthy and yet one bringing them in without inspection would be guilty.

And also under this statute, it is made a crime to bring in such cattle at any time of the year.

If one of your Honors lived on the state line and owned a cow, which strayed across the line into the Indian Territory (now Oklahoma) and the owner went into the Indian Territory and brought such cow back into the state, without first having her inspected, he would be guilty under this statute. Such cow would be healthy, and no one could suffer by reason of such act of the owner, and yet this state attempts by this statute to mete out punishment unless the owner had such cow inspected.

I do not believe that such law can be justified under any circumstances. It would be unreasonable, and would therefore be condemned.

A state has the right and the power to protect its own animals against disease and pestilence to the same extent that it has the right to protect its citizens.

Again it is to be observed that no one can bring cattle into any county of this state without inspection, regardless of the purpose of bringing them in, whether for immediate slaughter or otherwise.

Can it be possible that a statute prohibiting the bringing of healthy cattle into this state, or any county of the state, without inspection, can be upheld under the police powers of the state. Cattle are a subject of law-

ful interstate commerce, and as such cannot be legally subjected to interference by the states.

Again this statute requires an inspector who desires to inspect the stock, to go into the Indian Territory, out of the jurisdiction of this state, and make the inspection.

This statute not only interferes with interstate commerce, but also conflicts with the United States Statute and the Rules and Regulations of the Department of Agriculture. And it is well settled in cases of this kind that where Congress has legislated on the subject such legislation is exclusive on that subject.

Rule 13, offered in evidence on the trial of this case (Trans. p. 25), provides "From the 1st day of February to the 31st day of October, inclusive, of each year, no cattle shall be transported or driven or allowed to drift from the area quarantined by the Secretary of Agriculture for splenetic fever into any State or Territory or the District of Columbia or portion thereof outside of the said quarantine area, except as hereinafter provided. During the months of January, November and December of each year cattle from the area quarantined by the Secretary of Agriculture for splenetic fever may be shipped without restrictions other than those imposed by state or territorial officers at point of destination."

It will be observed that under this rule, cattle may be shipped "without restriction" at certain periods of the year. Under the statute on which this prosecution is based cattle may not be shipped at any time of the year, unless the same have been inspected. The rule of the Department of Agriculture referred to is in direct

conflict with this statute, and therefore the statute must give way.

The Secretary of Agriculture has the power and authority, under the Federal statute, to promulgate rules and regulations for the transportion of cattle, and he does so, but the state of Kansas steps in and nullifies his orders by the passage of the statute under consideration, or rather attempts to do so. All the authorities from this court hold that a statute attempting such a thing is unconstitutional and void.

It has been said by this court: "It may also be admitted that the police powers of a state justify the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious or infectious diseases."

Railroad Co. *vs.* Husen, 95 U. S. 465.

In the case cited above, this court held unconstitutional a statute of Missouri which prohibited the bringing into that state of any Texas, Mexican or Indian cattle, between the first of March and the first of November, as being in conflict with that clause of the constitution that provides that Congress shall have power

to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

In the case of Kimmish *vs.* Ball, 129 U. S. 217, this court, in speaking of the Husen case, said: "The decision in that case rested upon the ground that no discrimination was made by the law of Missouri in the transportation forbidden between sound cattle and diseased cattle; and this circumstance is prominently put forth in the opinion."

Such commodities as may lawfully become the subject of purchase, sale or exchange are articles of interstate commerce, within the protection of the commercial clause of the constitution.

Leisy *vs.* Hardin, 135 U. S. 100.
Schollenberger *vs.* Pennsylvania, 171 U. S. 1.
In re Ware, 53 Fed. Rep. 783.
Donald *vs.* Scott, 74 Fed. Rep. 859.
Sawrie *vs.* Tennessee, 82 Fed. Rep. 615.
In re Schietlin, 94 Fed. Rep. 272.
Bennett *vs.* American Express Co., 83 Me. 236.
Ballock *vs.* State, 73 Md. 1, 23 Amer. St. Rep. 559.

It seems to be well settled, upon both reason and authority, that a state has not the power to prevent the importation of lawful subjects of commerce.

Leisy *vs.* Hardin, 135 U. S. 100.
Lyng *vs.* Michigan, 135 U. S. 161.
Hannibal, etc., Ry. Co. *vs.* Husen, 95 U. S. 465.
Bowman *vs.* Chicago, etc., Ry. Co., 125 U. S. 489.
Schollenberger *vs.* Pennsylvania, 171 U. S. 1.

If an article is not a lawful subject of commerce, then unquestionably a state would have the right, under its police power, to exclude such article, and it is only when an article is not a lawful subject of commerce that it has such right.

Missouri, etc., Ry. Co. *vs.* Haber, 169 U. S. 613, (613).

Kimmish *vs.* Ball, 129 U. S. 217.

Hannibal, etc., Ry. Co. *vs.* Husen, 95 U. S. 465.

From the moment that an article of commerce commences to move from one state to another, it becomes a subject of interstate commerce, and, as such, is subject only to national legislation.

Bennett *vs.* American Express Co., 83 Md. 236, 23 Amer. St. Rep. 774.

People *vs.* Wemple, 23 Amer. St. Rep. 558.

Gilman *vs.* Philadelphia, 3 Wall. 724.

The Daniel Ball, 10 Wall. 557.

Coe *vs.* Errol, 116 U. S. 517.

Norfolk, etc., Ry. Co. *vs.* Pennsylvania, 136 U. S. 114.

Lehigh Valley Ry. Co. *vs.* Pennsylvania, 145 U. S. 192.

U. S. *vs.* E. C. Knight Co., 156 U. S. 13.

Ex p Kœhler, 30 Fed. Rep. 867.

Hardy *vs.* A. T. & S. F. Ry. Co., 32 Kans. 698.

Myers *vs.* Baltimore County, 83 Md. 385, 55 Amer. St. R. 349.

Under the statute under consideration, if a railroad company would transport cattle from the Indian Territory to Illinois, and each of the states through which

such animals were transported had statutes similar to the one in question, then it would be the duty of such railroad company to unload the cattle at the Kansas state line for inspection; they would also be compelled to unload them for inspection at the Missouri state line, and again at the Illinois state line for inspection. If such company failed to do so it would be liable to punishment in each of the states. If this sort of procedure would not be an interference with interstate commerce it would be difficult to imagine what would constitute such interference.

In the case at bar the defendant brought the cattle in question from the Indian Territory (now Oklahoma) into this state and proceeded with them to the railroad and shipped them to Missouri. He was engaged in interstate commerce, and was in possession of a lawful subject of interstate commerce.

State *vs.* Duckworth, 51 Pac. Rep. (Idaho) 456.

See also, Bowman *vs.* Chicago, etc., Ry. Co., 125 U. S. 489.

The attention of the court is directed to the discussion of this question in the first case cited, and as to the result that would follow if such statutes were upheld.

It will not do to say that the state may protect itself by the passage of statutes interfering with interstate commerce on the theory that possible injury may occur.

A state board of health, having power to promulgate and enforce such regulations for the better preservation of the public health in contagious and epidemic

diseases, etc., made an order that no pigpen should be built or maintained within one hundred feet of any well or spring of water used for drinking purposes. It was held that such statute could not be upheld; that it was unreasonable to make such a requirement when it was not shown that the maintenance of such pigpen had caused any disease, or that anyone was injuriously affected thereby.

State *vs.* Speyer, 67 Vt. 502.

If the animals with which defendant was charged with bringing into the state were not diseased, then they were lawful subjects of commerce. It was not charged that they were diseased; the trial court charged the jury that it made no difference whether they were or were not diseased, and the Supreme Court of Kansas agreed with the trial court. The question whether an article is or is not a subject of lawful interstate commerce must depend upon the intrinsic state or condition of the article, and not upon a mere declaration of a state legislature.

In re Rahrer, 140 U. S. 545.

The statute under consideration not only prohibits the bringing of ALL cattle into the state, whether diseased or not, but prohibits the importation thereof at ALL seasons of the year; and such statute is applicable to all persons. This court has held that a mere evasion of the right of congress to regulate commerce will not be tolerated.

Lake Shore, etc., Ry. Co., *vs.* Ohio, 173 U. S. 285.

A state may not under cover of exercising its police powers, substantially prohibit or burden any foreign or interstate commerce.

Brennen *vs.* Titusville, 153 U. S. 289.

New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S. 650.

Henderson *vs.* New York, 92 U. S. 259.

A police regulation going beyond the necessities of the case, and interfering with interstate commerce, is void.

Missouri, etc., Ry. Co. *vs.* Haber, 169 U. S. 613.

Hannibal, etc., Ry. Co. *vs.* Husen, 95 U. S. 473.

Illinois Central Ry. Co. *vs.* Ills., 163 U. S. 142.

Lake Shore, etc., Ry. Co. *vs.* Ohio, 173 U. S. 285.

It is quite likely that a statute of a state prohibiting the importation of cattle into a state *during a certain portion of the year*, without inspection, might be upheld as a valid police regulation. It is recognized that during the cold months of the year any germ of a disease would be killed by the weather. During the cold months of the year an inspection would be absolutely unnecessary, and worthless.

In the case at bar it is not claimed, nor could it be claimed, that cattle held within three miles of the south line of the state of Kansas were capable of communicating or liable to impart any disease to the cattle of the state. No cattle held at such place are claimed to be diseased; there is no infection there; there is no quar-

antine line there. The record in this case is absolutely void of any suggestion, even, of any of such facts.

The statute under consideration in this case arbitrarily fixes a certain line beyond which it is made a crime to bring cattle without an inspection, and that too regardless of the condition of such cattle; regardless of whether they are diseased or not; regardless of whether they are capable of communicating or liable to impart disease to the cattle of the state. And there is no limit to time, the statute prohibiting it at *all* times of the year.

But there is another aspect of this case that it may be well to mention. It will be observed that the statute under consideration contains the words "It shall be unlawful for any person or persons to bring, drive or transport any cattle into any county of the State of Kansas, *except for immediate slaughter, as provided in the preceding section.*" The words I shall now refer to are those which I have italicized. In order to understand the significance of the italicized words it will be necessary to notice the preceding section. The preceding section, referred to in section 27, reads as follows:

"Sec. 26. All cattle being at or brought from any point south of the south line of the state of Kansas, and carrying *Boophilus bovis*, or Southern ticks, are deemed to be infected with and capable of communicating Texas, splenic or Spanish fever, and such cattle shall not be shipped or transported into the state of Kansas, except for immediate slaughter, and then only under such

rules and regulations as may be prescribed by the live stock sanitary commission."

Sec. 8179, Gen. Stat. Kansas, 1905.

The object of section 8179 is to prevent the importation of *diseased* cattle into this state. This being true, then the following section, 8180, must be held to prevent the importation of cattle *free from disease;* sound cattle. Can the state, under the guise of an inspection law, prevent the importation of *sound* cattle into the state? Is not such a regulation unreasonable? On what theory can a state require the inspection of healthy cattle? What good purpose can be subserved by such an inspection? It is an idle ceremony; is unreasonable, and highly injurious, and an interference with interstate commerce.

Under the first section, 8179, diseased cattle *can* be brought into this state for *immediate slaughter*, without an inspection; under the latter section, 8180, healthy cattle *cannot* be brought into this state for immediate slaughter, without an inspection. That the state has the right to prohibit the importation of *diseased* cattle, cannot be doubted, but *healthy* cattle do not occupy the same position as *diseased* cattle.

It is not believed that this kind of legislation will be sustained by this court.

Congress having power to regulate commerce among the states to the same extent as with foreign nations, when that body acts all conflicting laws must give way. In this case it being shown that the rules and regulations of the Secretary of Agriculture are in

direct conflict with the statute of this state under consideration, then the statute must give way.

Hinson *vs.* Lott, 75 U. S. 148.

This statute being a regulation of commerce under the guise of an inspection law, cannot be upheld, but must be condemned.

State of Minnesota *vs.* Barber, 136 U. S. 313.
Brimmer *vs.* Rebman, 138 U. S. 78.

In the case of The Gulf C. & S. F. Ry. Co. *vs.* Hefley & Lewis, 158 U. S. 99-105, this court said:

"Generally it may be said in respect to laws of this character that though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the State, is subordinate to those in terms conferred by the Constitution upon the nation. No urgency for its use can authorize a state to exercise it in regard to a subject-matter which has been confided conclusively to the discretion of Congress by the Constitution. Definitions of the police power must, however, be taken subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general Government, or rights granted or secured by the supreme law of the land. While it may be a police power in the sense that all provisions for the health, comfort and security of the citizens are police regulations and an exercise of police power, it has been said more than once in this court, that where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail. * * * It is unnecessary to pursue this discussion further. The State statute and the national law operate upon the same subject-matter, and prescribe different rules concerning it. The na-

tional law is unquestionably one within the competency of Congress to enact under the power given to regulate commerce between the States. The State statute must, therefore, give way."

The case last cited would seem to be conclusive. The Federal and state authorities conflict as to the shipment of stock, as heretofore pointed out, and therefore the statute of the state must be held to be unconstitutional.

For the reasons suggested, it is respectfully urged that the decision and judgment of the court below be reversed, and for other proper relief.

Respectfully submitted,

ARCHIE D. NEALE, AND NELSON CASE,

ATTORNEYS FOR PLAINTIFF IN ERROR.

Office Supreme Court, U. S.
FILED.
DEC 31 1907
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 166.

B. F. ASBELL, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS.

BRIEF OF APPELLEE.

(20,481.)

E. L. BURTON,
Attorney for Appellee.

C. E. PILE,
W. B. GLASSE,
Of Counsel.

IN THE SUPREME COURT

OF THE

UNITED STATES

B. F. ASBELL, Appellant,

vs.

THE STATE OF KANSAS, Appellee.

No. 20,481.

BRIEF OF APPELLEE.

STATEMENT OF CASE.

The appellant in this case, B. F. Asbell, a citizen of the State of Kansas, was convicted in the District Court of Labette county, Kansas, of the offense of having violated the provisions of an act of the legislature of that state entitled:

"An Act for the protection of domestic animals, and repealing sections 7421, and 7423, and article 10 of chapter 105 of the Compiled Laws of Kansas, of 1901, and all acts and parts of acts in conflict herewith, and providing penalties for the violation thereof,—" being Chapter 495 of the Session Laws of 1905.

Section 27 of said Act is as follows:

"Section 27. It shall be unlawful for any person, or persons, to bring, drive or transport any cattle into any county of the State of Kansas except for immediate slaughter, as provided in the preceding section, from any point south of the south line of Kansas,

without having first caused such animal or animals to be inspected and passed under certificate of health by the live-stock sanitary commissioner of this state, or some inspector thereof, duly authorized by such commissioner, or by the bureau of animal industry of the Interior Department of the United States government; and any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty nor more than one thousand dollars, or by imprisonment in the county jail not less than thirty days, nor more than one year, or by both such fine and imprisonment."

After the return of a verdict of guilty, the hearing and overruling of a motion for new trial, and the hearing and overruling of a motion in arrest of judgment the trial court pronounced judgment against the appellant, there defendant, as follows:

"It is therefore by the court considered, ordered, adjudged and decreed that the defendant be confined in the county jail of Labette county, Kansas, for the period of thirty days, and that he pay a fine to the state of Kansas in the sum of $500, and pay the costs of this action taxed at $ . . . . . , and that he be committed to the custody of the sheriff of Labette county, Kansas, until the said decree and judgment of the court be fully carried out or he be discharged by due course of law."

After the pronouncing of this judgment the defendant appealed the case to the Supreme Court of the State where the judgment of the trial court was affirmed.

It is the affirmance of this judgment that is here complained: the assigned errors being in substance:

"The Supreme Court of Kansas erred in holding and deciding that section 27, of chapter 495, Session Laws of Kansas 1905, was valid."

* * * * * * *

Said error is more particularly set forth as follows:

The Supreme Court of Kansas erred in holding and deciding—

FIRST: That said section 27 was not an unreasonable re-

striction upon interstate commerce, as guaranteed by Section 8, Article 1, of the Constitution of the United States, and—

SECOND: In holding and deciding that said section did not violate that part of Section 2, Article 4, of the Constitution of the United States, which reads: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

In the assignment of the errors it is recited, truthfully, that: "The validity of said section was denied and drawn in question by the defendant on the ground of its being repugnant to the Constitution of the United States, and in controvention thereof."

ARGUMENT.

This Act is simply an *inspection law*, and falls clearly within the scope of police regulation; and we note that the errors assigned challenge *only* the validity of Sec. 27 of the Act of which it is a part. And whether the punishment prescribed by that section is reasonable or unreasonable, or is a reasonable or unreasonable restriction on interstate commerce, is dependant on the duties imposed on the citizen, and the provisions of the Act which prescribe the duty, the performance of which exempt him from its penalties, or point out a way by which he may avoid the punishment prescribed. Two of these provisions are prescribed in the very section complained of. They are: (1), "Having first caused such animal or animals to be *inspected* and passed under certificate of health by the Livestock Sanitary Commissioners of this state, or some inspector thereof, duly authorized by such commissioner; or (2), by the Bureau of Animal Industry of the Interior Department of the United States government."

The third requirement of the citizen is provided and found in section 29 of the Act, and is simply that he *present* his stock to the *patrolmen* or *inspectors* for examination and *inspection*. These patrolmen or inspectors are provided for in section 28 of the Act, and it is made their duty to patrol the south line of the state and supervise the movement of cattle from south of the south line of the state.

These are all the things that are required of any citizen who desires to bring cattle into this state from the territory south of it. He is simply required to have his cattle *inspected* and that can be done by the patrol with little inconvenience to the citizen, and the *expense of the inspection* is borne by the state, when it does the inspecting; and when the inspecting is done by the Bureau of Animal Industry of the Interior Department, it is difficult to see why the citizen should complain of the law of the state of Kansas. The act of congress creating this bureau invites the co-operation of the states in the protection of their domestic animals from contagious diseases. It was and is a fact well known throughout the state of Kansas that cattle brought into it from territory south was and is liable to communicate disease to cattle kept in the state; and with such knowledge this law was passed. And it does not contravene any law of congress nor encroach on the right of congress to regulate interstate commerce. Indeed it is in aid of the law of congress and allows any citizen to invoke the action of the Bureau of Animal Industry of the Interior Department. And if the cattle were found to be free from southern ticks they could come into the state freely; but if they were found to bear such vermin the state had the right to keep them out. And while the state had the right to *inspect*, and while it is its *duty to inspect*, and thus protect its stock against contagious or infectious diseases, it is difficult to see how such inspection could be had with less inconvenience or less expense to the citizen. The reasonableness of the law should not be questioned by any citizen of the state of Kansas.

STATE MAY INSPECT. AUTHORITIES.

That the state may pass inspection laws has often been decided and clearly held by this court; and for the convenience of the court we cite and quote from the following: In the case of—

Patapsco Guano Company, Appt., vs. Board of Agriculture of North Carolina, et al., 171 U. S. 345, it is said:

"Inspection laws are valid when they act on a subject before it becomes an article of commerce, and also when, although operating on articles brought from one state into another, they pro-

vide for inspection in the exercise of that power of self-protection commonly called the police power.

Interstate as well as foreign commerce is subject to a state inspection law."

In the opinion in this case Mr. Chief Justice Fuller, after stating the facts, says:

"Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, and also when, although operating on articles brough from one state into another, they provide for inspection in the exercise of that power of self-protection commonly called the police power.

No doubt can be entertained of this where the inspection is manifestly intended, and calculated in good faith, to protect the public health, the public morals, or the public safety. Minnesota v. Barber, 136 U. S. 313 (34:455, Inters. Com. Dep. 175). And it has now been determined that this is so, if the object of the inspection is the prevention of imposition on the public generally."

In the case of—

Mo. K. T. Ry. Co., Plaintiff in Error v. Charles Haber et al., 169, U. S. 613, it is said:

"The power of the states to protect their domestic cattle from contagious diseases was left untouched and unimpaired by the act of Congress of March 29, 1884.

Nor is said statute of Kansas a regulation of commerce among the states simply because it may incidentally affect such commerce."

In the opinion in this case Mr. Justice Harlan, after stating the facts, says:

"The act of congress did not assume to give any corporation, company, or person the affirmative right to transport from one state to another state cattle that were liable to impart or capable of communicating contagious, infectious, or communicable diseases. On the contrary, it was made a misdemeanor to deliver for transportation or to transport or drive from one state to another cattle known to be affected with contagious, infectious, or communicable diseases."

These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a state belongs primarily to such state under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the state upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress must be respected until Congress intervenes."

In the case of—

Morgan's Louisiana and Texas R. R. and Steamship Co., Plff. in Error v. Board of Health of the State of Louisiana, and State of Louisiana, 118 U. S. 455, it is said:

"The system of quarantine laws established by Statutes of Louisiana is a rightful exercise of the police power for the protection of health, which is not forbidden by the Constitution of the United States."

In the opinion in this case, Mr. Justice Miller, after stating the facts, says:

"In all cases of this kind it has been repeatedly held that when the question is raised whether the state statute is a just exercise of state power, or is intended by roundabout means to invade the domain of federal authority, this court will look into the operation and effect of the statute to discern its purpose. See — Henderson v. Mayor, 92 U. S. 259 (Bk. 23, L. ed. 543); Chy Lung Freeman, 92 U. S. 275 (Bk. 23, L. ed. 350); Cannon v. Orleans, 20 Wall. 577 (87 U. S. bk. 22, L. ed. 417).

But aside from all this, quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce, or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress.

The matter is one in which the rules that should govern it may in many respects be different in different localities, and for

that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, a hundred miles from the sea, may be widely and wisely different from that which is best for the Harbor of New York."

In the case of—

Patterson v. Commonwealth of Kentucky 97th U. S. 501, this court quotes approvingly from Cooley on Constitutional Limitations, where he says:

"In the American constitutional system the power to establish the ordinary regulations of police has been left with the individual States, and can not be assumed by the national government. . . . If the power only extends to a just regulation of rights, with a view to due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the state, and its exercise for the regulation of the property and actions of its citizens, can not well constitute an invasion of national jurisdiction or afford a basis for an appeal to the protection of the national authority." Cooley Const., Lim. 574. And in addition this court says:

"While it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule, the exact limitations which the states must observe in its exercise, the *existence* of such power *in the States* has been *uniformally recognized in this court.*"

In the case of—

Kammish v. Ball, 129 U. S. 217, this court took notice of the fact, which, by the way, is current history, that cattle in the territory south of Kansas, are liable to communicate what is commonly known as Texas fever. In this case Mr. Justice Field says:

"That cattle coming from those sections of the country during the spring and summer months are often infected with a contagious and dangerous fever is a notorious fact; as is also the fact that cold weather, such as is usual in the winter north of the southern boundary of Missouri and Kansas, destroys the virus of

the disease, and this removes all danger of infection. It is upon these notorious facts that the legislation of Iowa for the exclusion from their limits of these cattle, unless they have passed a winter north, is based. See Missouri Pac. R., Co., v. Finley 38 Kan. 556, also First Annual Report to the Commissioners of Agriculture, of the Bureau of Animal Industry for 1884, p. 426, and Second Annual Report of same Bureau for 1885, p. 310."

PRIVILEGES OF CITIZENS, ETC.

I do not deem it necessary to discuss that part of the errors assigned charging a violation of Sec. 2, of Act. 4, of the Constitution which provides that:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

In what is known as—

The Slaughter House Cases.

16 Wallace 26, this court, in construing this section of the constitution said:

"Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.

* * * * * *

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the states as such, and that they are left to the state government for security and protection, and not by this article placed under the special care of the Federal Government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so."

In conclusion we desire to say that the State of Kansas had a right to pass reasonable inspection laws to protect its cattle against contagious and infectious diseases. That the inspection

law provided for is reasonable and does not unreasonably interfere with interstate commerce. That under the said provision of the Kansas statute any citizen of any of the states is entitled to all the privileges and immunities of the citizens of Kansas. Therefore, the decision of the Supreme Court of the State of Kansas should be affirmed.

Respectfully submitted,

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Of Counsel.

without having them first inspected, regardless of whether such cattle are infected or are perfectly healthy, is not a proper exercise of the police power.

This statute not only interferes with interstate commerce, but also conflicts with the United States statute and the rules and regulations of the Department of Agriculture. In cases of this kind where Congress has legislated on the subject such legislation is exclusive on that subject.

The Secretary of Agriculture has the power and authority, under the Federal statute, to promulgate rules and regulations for the transportation of cattle, and he does so, but the State of Kansas steps in and nullifies his orders by the passage of the statute under consideration, or rather attempts to do so. A statute attempting such a thing is unconstitutional and void.

Commodities which may lawfully become the subject of purchase, sale or exchange are articles of interstate commerce, within the protection of the commerce clause of the Constitution. *Leisy* v. *Hardin*, 135 U. S. 100; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *In re Ware*, 53 Fed. Rep. 783; *Donald* v. *Scott*, 74 Fed. Rep. 859; *Sawrie* v. *Tennessee*, 82 Fed. Rep. 615; *In re Schietlin*, 94 Fed. Rep. 272; *Bennett* v. *American Express Co.*, 83 Maine, 236; *Ballock* v. *State*, 73 Maryland, 1; *S. C.*, 23 Am. St. Rep. 559.

A State has not the power to prevent the importation of lawful subjects of commerce. Cases *supra* and *Lyng* v. *Michigan*, 135 U. S. 161; *Hannibal &c. Ry. Co.* v. *Husen*, 95 U. S. 465; *Bowman* v. *Chicago &c. Ry. Co.*, 125 U. S. 489.

In this case defendant brought the cattle in question from the Indian Territory (now Oklahoma) into Kansas and proceeded with them to the railroad and shipped them to Missouri. He was engaged in interstate commerce, and was in possession of a lawful subject of interstate commerce. *State* v. *Duckworth*, 51 Pac. Rep. (Idaho) 456.

If the animals with which defendant was charged with bringing into the State were not diseased, they were lawful subjects of commerce. It was not charged that they were diseased; the

trial court charged the jury that it made no difference whether they were or were not diseased, and the Supreme Court of Kansas agreed with the trial court. Whether an article is or is not a subject of lawful interstate commerce depends upon the intrinsic state or condition of the article, and not upon a mere declaration of a state legislature. *In re Rahrer*, 140 U. S. 545.

This statute being a regulation of commerce under the guise of an inspection law, cannot be upheld, but must be condemned. *State of Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; *Gulf. C. & S. F. Ry. Co.* v. *Hefley & Lewis*, 158 U. S. 99, 105.

Mr. E. L. Burton, Mr. C. E. Pile and *Mr. W. B. Glasse* for defendant in error:

The regulation of the rights and duties of all persons within the jurisdiction of a State belongs primarily to such State under its reserved power to guard the safety of persons and property within its borders, and even where the subject of such regulations is one over which Congress exercises exclusive control, any action of the State upon the subject which is not a direct interference with rights secured by the Constitution of the United States or by some valid act of Congress must be respected until Congress intervenes. *Patapsco Guano Co.* v. *Board of Agriculture of North Carolina*, 171 U. S. 345; *Minnesota* v. *Barber*, 136 U. S. 313; *M., K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613; *Morgan's La. & Texas R. R. Co.* v. *Bd. of Health of La.*, 118 U. S. 455, and cases cited. See also *Patterson* v. *Kentucky*, 97 U. S. 501; *Kammish* v. *Ball*, 129 U. S. 217, and cases cited.

MR. JUSTICE MOODY delivered the opinion of the court.

A statute of the State of Kansas makes it a misdemeanor, punishable by fine or imprisonment, or both, for any person to transport into the State cattle from any point south of the south line of the State, except for immediate slaughter, without hav-

ing first caused them to be inspected and passed as healthy by the proper state officials or by the Bureau of Animal Industry of the Interior Department of the United States. Sec. 27, ch. 495, Session Laws of 1905. The plaintiff in error was duly charged by information in the state court with a violation of this statute, and found guilty by the verdict of a jury. The conviction was affirmed by the Supreme Court of the State, and the case is now here on a writ of error, allowed by the chief justice of that court. The only Federal question insisted upon in argument is whether the statute was a restriction of interstate commerce which was not within the power of a State to impose.

The obvious purpose of the law was to guard against the introduction into the State of cattle infected with a communicable disease. It undoubtedly restricts the absolute freedom of interstate commerce in cattle, but only to the extent that all cattle coming to cross the guarded boundary are subjected to inspection to ascertain whether or not they are diseased. If healthy they are admitted, if diseased they are excluded. The validity of such a restriction for such purposes has been frequently considered by this court, and the principles applicable to the settlement of the question have been clearly defined. The governmental power over the commerce which is interstate is vested exclusively in the Congress by the commerce clause of the Constitution, and therefore is withdrawn from the States. It is not now necessary to cite the many cases supporting this proposition, or to consider some expressions in the books somewhat qualifying its generality, because in carefully chosen words it has recently been affirmed by us. At this term, Mr. Justice Peckham, speaking for the court, said: "That any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution is obvious." *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328, 334.

But though it may not legislate for the direct control of interstate commerce, the State may exercise any part of the legis-

lative power which was not withdrawn from it expressly or by implication by the scheme of government put into operation by the Federal Constitution. It may sometimes happen that a law passed in pursuance of the acknowledged power of the State will have an indirect effect upon interstate commerce. Such a law, though it is essential to its validity that authority be found in a governmental power entirely distinct from the power to regulate interstate commerce, may reach and indirectly control that subject. It was at an early day observed by Chief Justice Marshall that legislation referable to entirely different legislative powers might affect the same subject. He said in *Gibbon* v. *Ogden*, 9 Wheat. 194, 204:

"So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means. All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

"In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other."

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 166. Submitted March 6, 1908.—Decided March 23, 1908.

While the State may not legislate for the direct control of interstate commerce, a proper police regulation which does not conflict with congressional legislation on the subject involved is not necessarily unconstitutional because it may have an indirect effect upon interstate commerce.

Until Congress acts on the subject a State may, in the exercise of its police power, enact laws for the inspection of cattle coming from other States. *Reid* v. *Colorado*, 187 U. S. 137.

Congress has not enacted any legislation destroying the right of a State to provide for the inspection of cattle and prohibiting the bringing within its borders of diseased cattle not inspected and passed as healthy either by the proper state or national officials.

A State may not under pretense of protecting the public health exclude the products or merchandise of other States, and this court will determine for itself whether it is a genuine exercise of the police power or really and substantially a regulation of interstate commerce.

Section 27 of Chap. 495 of the laws of Kansas of 1905, prohibiting the transportation of cattle from any point south of the State into the State except for immediate slaughter which have not been passed as healthy by the proper state officials or by the National Bureau of Animal Industry is a proper police regulation within the power of the State, is not in conflict with the act of February 2, 1903, 32 Stat. 791, or the act of March 3, 1905, 33 Stat. 1204, in regard to inspection of cattle, and is not unconstitutional as a direct regulation of interstate commerce.

60 Kansas, 51, affirmed.

THE facts are stated in the opinion.

Mr. Archie D. Neale and *Mr. Nelson Case* for plaintiff in error:

A statute which prohibits the bringing of cattle into the State

Foreseeing cases where national and state legislation based upon different powers might, in their application, be brought into conflict, he, in the same case (p. 211), declared that then "the law of the State, though enacted in the exercise of powers not controverted, must yield," a rule which has constantly been applied by this court. These general principles control the decision of the case at bar. Cattle, while in the course of transportation from one State to another, and in that respect under the exclusive control of the law of the National Government, may at the same time be the conveyance by which disease is brought within the State to which they are destined, and in that respect subject to the power of the State exercised in good faith to protect the health of its own animals and its own people. In the execution of that power the State may enact laws for the inspection of animals coming from other States with the purpose of excluding those which are diseased and admitting those which are healthy. *Reid* v. *Colorado*, 187 U. S. 137.

The State may not, however, for this purpose exclude all animals, whether diseased or not, coming from other States, *Railroad* v. *Husen*, 95 U. S. 465, nor under the pretense of protecting the public health, employ inspection laws to exclude from its borders the products or merchandise of other States; and this court will assume the duty of determining for itself whether the statute before it is a genuine exercise of an acknowledged state power, or whether, on the other hand, under the guise of an inspection law it is really and substantially a regulation of foreign or interstate commerce which the Constitution has conferred exclusively upon the Congress. *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345. Tested by these principles, the statute before us is an inspection law and nothing else, it excludes only cattle found to be diseased, and in the absence of controlling legislation by Congress it is clearly within the authority of the State, even though it may have an incidental and indirect effect upon commerce between the States.

The cause, however, cannot be disposed of without inquiring whether there was at the time of the offense any legislation of Congress conflicting with the state law. If such legislation were in existence the state law, so far as it affected interstate commerce, would be compelled to yield to its superior authority. This question was considered and the national legislation carefully examined in *Reid* v. *Colorado*, *supra*, and the conclusion reached that Congress had not then taken any action which had the effect of destroying the right of the State to act on the subject. It was there said, p. 148: "It did not undertake to invest any officer or agent of the Department with authority to go into a State, and, without its assent, take charge of the work of suppressing or extirpating contagious, infectious or communicable diseases there prevailing, and which endangered the health of domestic animals. Nor did Congress give the Department authority, by its officers or agents, to inspect cattle within the limits of a State and give a certificate that should be of superior authority in that or other States, or which should entitle the owner to carry his cattle into or through another State without reference to the reasonable and valid regulations which the latter State may have adopted for the protection of its own domestic animals. It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested." There has, however, been later national legislation which needs to be noticed. Large powers to control the interstate movement of cattle liable to be afflicted with a communicable disease have been conferred upon the Secretary of Agriculture by the act of February 2, 1903, 32 Stat. 791, and the act of March 3, 1905, 33 Stat. 1204. The provisions of these acts need not be fully stated. The only part of them which seems relevant to this case and the question under consideration which arises in it is contained in the law of 1903. In that law it is enacted that when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected cattle or live stock and found

them free from infectious, contagious or communicable disease, "such animals so inspected and certified may be shipped, driven, or transported . . . into . . . any State or Territory . . . without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture." There can be no doubt that this is the supreme law, and if the state law conflicts with it the state law must yield. But the law of Kansas now before us recognizes the supremacy of the national law and conforms to it. The state law admits cattle inspected and certified by an inspector of the Bureau of Animal Industry of the United States, thus avoiding a conflict with the national law. Rule 13, issued by the Secretary of Agriculture under the authority of the statute, is brought to our attention by the plaintiff in error. It is enough to say now that the rule is directed to transportation of cattle from quarantined States, which is not this case, and that in terms it recognizes restrictions imposed by the State of destination. Our attention is called to no other provision of national law which conflicts with the state law before us, and we have discovered none.

Judgment affirmed.